No. 87-1602-CFH
Status: GRANTED

Title: Ronald D. Castille, etc., et al., Petitioners
v.
Michael Peoples

Docketed:
March 25, 1988

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Barthold,Gaele McLauglin

Counsel for respondent: Welsh Jr.,Robert E.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Mar 25 1988 | G | Petition for writ of certiorari filed. |
| 2 | Apr 27 1988 | | DISTRIBUTED. May 12, 1988 |
| 3 | Apr 27 1988 | X | Brief of respondent Michael Peoples in opposition filed. |
| 4 | May 16 1988 | | Petition GRANTED. |
| | | | ********** |
| 6 | May 25 1988 | | Order extending time to file brief of petitioner on the merits until July 19, 1988. |
| 7 | Jul 18 1988 | | Brief of petitioner Ronald Castille filed. |
| 8 | Jul 18 1988 | | Joint appendix filed. |
| 9 | Aug 17 1988 | G | Motion of respondent for leave to proceed further herein in forma pauperis filed. |
| 10 | Aug 17 1988 | G | Motion of respondent for appointment of counsel filed. |
| 11 | Aug 23 1988 | | Record filed. |
| | | * | Certified copy of briefs, appendix and partial proceedings received. |
| 12 | Aug 26 1988 | | Brief of respondent Michael Peoples filed. |
| 13 | Sep 22 1988 | | Reply brief of petitioner Ranald Castille filed. |
| 16 | Sep 30 1988 | | Set for argument. Tuesday, December 6, 1988. (3rd case) (1 hr.) |
| 14 | Oct 3 1988 | | Motion of respondent for leave to proceed further herein in forma pauperis GRANTED. |
| 15 | Oct 3 1988 | | Motion for appointment of counsel GRANTED and it is ordered that Robert E. Welsh, Jr., Esquire, of Philadelphia, Pennsylvania, is appointed to serve as counsel for the respondent in this case. |
| 17 | Oct 7 1988 | | CIRCULATED. |
| 18 | Dec 6 1988 | | ARGUED. |

87-1602

NO. _____



IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
THOMAS FULCOMER, Superintendent,
Huntingdon State Correctional Institute;
and LEROY ZIMMERMAN, Attorney General
of Pennsylvania,
Petitioners

V.

MICHAEL PEOPLES,
Respondent

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

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## QUESTIONS PRESENTED

1. Must not this Court resolve the direct decisional conflict within the Courts of Appeals created by a Third Circuit requirement that state courts violate their own rules and procedures to comply with federal habeas corpus exhaustion requirements?

2. Where state procedures are flouted and the highest state court is thereby denied a fair opportunity for review, must not a state habeas corpus applicant utilize remaining available state remedies before he may obtain federal habeas corpus review?

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NO. _____

IN THE SUPREME COURT
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OCTOBER TERM, 1987

RONALD D. CASTILLE, District Attorney
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Petitioners

V.

MICHAEL PEOPLES,
Respondent

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

Petitioners, Ronald D. Castille, District Attorney of Philadelphia County, Thomas Fulcomer, Superintendent, Huntingdon State Correctional Institute, and Leroy Zimmerman, Attorney General of the Commonwealth of Pennsylvania, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this matter. The opinion

was filed December 30, 1987, and rehearing was denied January 25, 1988. The Third Circuit has stayed issuance of its mandate pending resolution of the present petition.

## OPINIONS BELOW

The unreported panel opinion of the Court of Appeals for the Third Circuit is reprinted in Appendix A at 1A-16A. The denial of rehearing is reprinted in Appendix B at 1B-2B, and the orders of the United States District Court for the Eastern District of Pennsylvania and the incorporated Report and Recommendation of the United States Magistrate are reprinted in Appendix C at 1C-17C.

## STATEMENT OF JURISDICTION

Invoking jurisdiction under 28 U.S.C. §2254, respondent Michael Peoples brought this habeas corpus action in the Eastern District of Pennsylvania. By orders dated April 17, 1987 and April 21,

1987, the Eastern District dismissed the habeas corpus petition on exhaustion grounds. On December 30, 1987, a Third Circuit panel entered a judgment and opinion reversing the Eastern District's orders and remanding for a hearing on the merits of the habeas corpus petition. Petitioner's request for rehearing by the Court of Appeals en banc was denied on January 25, 1988. Issuance of the Third Circuit's mandate has been stayed pending decision on this petition.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. §1254(1).

**STATUTE INVOLVED**

28 U.S.C. §2254(b) and (c), which provide:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant

has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

## STATEMENT OF THE CASE

Respondent was convicted of arson-endangering persons, robbery and related charges in this 1981 case wherein the victim was dragged off a Philadelphia sidewalk, robbed and set afire. Upon conviction, respondent, represented by counsel, began a direct appeal. Post-verdict motions were filed with the state trial court, argued and denied.[2] The

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[2]Post-verdict motions represent the initial stage of the appellate process
(Footnote Continued)

motions challenged, inter alia, the denial of a non-jury trial, the scope of the prosecutor's cross-examination, and the admissibility of the identification evidence. All of these claims were later raised in federal court.

Represented by new counsel, respondent appealed to the Pennsylvania Superior Court, the state's intermediate appellate court. In that court, respondent abandoned the non-jury trial issue but pursued the cross-examination and

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(Footnote Continued)
under Pennsylvania law. Accordingly, any claim omitted from written post-verdict motions is waived for subsequent appellate consideration. Pa.R.Crim.P. 1123(a) (only issues contained in written post-verdict motions may be heard or argued); Pa.R.A.P. 302(a) (issues not raised in lower court may not be raised for the first time on appeal); Commonwealth v. Mitchell, 464 Pa. 117, 121-126, 346 A.2d 48 (1975) (announcing strict enforcement of appellate waiver provisions).

identification claims.[3] Additionally, he raised for the first time in the Superior Court, the claim of the ineffective assistance of trial counsel, based on grounds which he later abandoned in federal court.[4] The Superior Court

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[3]Pennsylvania's waiver rule applies equally to claims abandoned at the intermediate appellate court level. Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1975) (claim raised in trial or sentencing court but abandoned in the intermediate appellate court is waived for Supreme Court review); accord, Sheppard v. Old Heritage Mutual Insurance Co., 492 Pa. 581, 425 A.2d 304 (1980) (failure to pursue issue on appeal is just as effective a waiver as failure to initially raise it).

[4]Under Pennsylvania law, the issue of the ineffective assistance of counsel must be raised at the first opportunity at which an accused is represented by new counsel or it is waived. Commonwealth v. Webster, 490 Pa. 322, 416 A.2d 491 (1980) (exception to rule that issues not raised in post-verdict motions will not be considered on appeal is when ineffectiveness of prior counsel is raised; but in such a case, ineffectiveness must be raised at earliest

(Footnote Continued)

affirmed the judgment of sentence. Commonwealth v. Peoples, 319 Pa. Super. 621, 466 A.2d 720 (1983).

Respondent then sought review in the state's highest court, the Pennsylvania Supreme Court. He filed a pro se document with that court, entitled Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of New Counsel. Respondent

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(Footnote Continued)
stage in proceedings at which counsel whose representation is being challenged no longer represents the accused); accord, Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977). A claim of the ineffective assistance of counsel will not be decided on direct appeal, however, unless clear and irrefutable proof of the issue appears on the face of the record. See, e.g., Commonwealth v. Cook, 230 Pa. Super. 283, 326 A.2d 461 (1974). If the record is inadequate, an appellate court may remand the case for an evidentiary hearing, Commonwealth v. Davis, 499 Pa. 282, 453 A.2d 309 (1982), or await the results of a post conviction proceeding. Commonwealth v. Cook, supra, 230 Pa. Super. at 283, 326 A.2d at 461.

requested that the court appoint new counsel to "raise and argue ineffective assistance of former trial, post-verdict and appellant (sic) counsel" (emphasis added). In addition, respondent included approximately eleven (11) claims of purported error. The claims far exceeded those raised below, in number and content, and presented most of the new claims under the rhubric of ineffective assistance of counsel. The previously abandoned non-jury trial issue was resurrected.

The Supreme Court granted respondent's request for counsel and remanded the case to the trial court for the appointment of counsel "to assist petitioner in filing a petition for allowance of appeal." Counsel was appointed and timely filed a petition for allowance of appeal. The counselled petition raised the ineffective assistance of appellate counsel on two grounds raised

neither in the courts below, nor, later, in the federal habeas corpus petition. The subsequent counselled allocatur petition contained only one of the claims respondent had raised pro se. Conceding therein that the record was insufficient to permit a resolution of his claims, respondent, through counsel, also then requested a remand to the trial court for an evidentiary hearing on the ineffectiveness claims. The Supreme Court refused discretionary review.[5]

The Supreme Court's ruling opened the way for state review of respondent's claims through Pennsylvania's post conviction avenue of relief.[6] That remedy

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[5]Discretionary review in the Pennsylvania Supreme Court is analogous to certiorari review in this Court, with reasons for denials rarely given.

[6]Post-Conviction Hearing Act, 42
(Footnote Continued)

allows litigation of claims of the ineffective assistance of counsel, which have not been previously waived. Moreover, it permits the litigation of claims, apparently waived on direct appeal, where a petitioner can prove the existence of "extraordinary circumstances" justifying the failure to raise the issue, or can otherwise rebut the presumption of a "knowing and understanding" failure to

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(Footnote Continued)
Pa.C.S.A. §9541, et seq. For the purposes of state post conviction litigation, the state supreme court's denial of discretionary review was not a ruling on the merits of the claims. The issues were not rendered "finally litigated" by that denial and were not barred from the state post conviction review. Pa.C.S.A. §9544(a)(1)-(3); Commonwealth v. Tarver, 493 Pa. 320, 426 A.2d 569 (1981) (bar to post-conviction review of claims which are finally litigated is not imposed by denial of allocatur).

raise the issue timely.[7] Commonwealth v. Dancer, 460 Pa. 95, 331 A.2d 435 (1978).

Instead of pursuing that state remedy, however, respondent sought relief in federal court. He filed a petition for federal habeas corpus relief which alleged five bases for relief. As the Third Circuit found in its opinion, however, none of the five claims had been presented to the Pennsylvania Supreme Court in the counselled petition. The Third Circuit

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[7] Pa.C.S.A. §9543(3)(vi) (ineffective assistance of counsel is a ground for post-conviction relief). Pennsylvania's Post Conviction Hearing Act further provides that a petitioner "must prove [t]hat the error resulting in his conviction and sentence has not been ... waived." 42 Pa.C.S.A. §9543(4). "[A]n issue is waived [under the Act] if: 1) the petition knowingly and understandingly failed to raise it and it could have been raised ... on appeal ... and 2) [t]he petitioner is unable to prove the existence of extraordinary circumstances to justify his failure to raise the issue." 42 Pa.C.S.A. §9544(b).

further found that the two habeas claims of the ineffective assistance of trial counsel had been presented to the state courts only in the pro se document to the Supreme Court, and that the habeas non-jury trial claim had been abandoned at the intermediate appellate court level, being raised thereafter only in the pro se document before the state Supreme Court. Based on respondent's state appellate defaults, and because a state avenue of review was still available, the Eastern District dismissed the petition for failure to exhaust state remedies.[8]

The Third Circuit Court of Appeals reversed, based upon its ruling in Chaussard v. Fulcomer, 816 F.2d 925 (3d

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[8]The District Court's dismissal orders predated the April 27, 1987 Third Circuit decision in Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir. 1987). See, text and n.9, infra.

Cir. 1987).[9] Thus, even though the Court found that respondent had violated state appellate procedures in the state direct appeal, and had presented ineffective assistance of counsel claims not yet ripe for appellate decision, the Third Circuit found federal habeas corpus exhaustion requirements had been satisfied simply because each of the habeas claims was contained in the pro se document to the Supreme Court.[10] The Court, therefore,

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[9]In Chaussard, two of the habeas claims presented to the state's highest court had been abandoned at the intermediate appellate court level. Misapplying this Court's opinion in Smith v. Digmon, 434 U.S. 332 (1978), the Third Circuit declined to attach habeas corpus significance to the state appellate default, concluding that the mere presentation of claims to a state's highest court, however improperly, will satisfy the comity-based exhaustion requirement.

[10]The Court reached its result even though it recognized that "the

(Footnote Continued)

remanded the case to the District Court to proceed on the merits.

Because the Third Circuit's ill-based rule intolerably intrudes on the operation of the state judiciary, and, moreover, breathes new life into forum-shopping as a viable federal habeas corpus strategy, the Commonwealth of Pennsylvania, through the named petitioners, seeks this Court's review.

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(Footnote Continued)
Pennsylvania Supreme Court exercised its discretion in such a way as to avoid deciding an issue before it was presented by counsel; once a counseled petition had been filed, it would have been improper to consider the claims raised in the pro se petition but not the counseled one." Appendix 11A-12A. Constrained by Chaussard, however, the Court ruled that those state "choices" could be accorded no federal deference and would "allow a federal court to hear the merits of People's petition." Id. Apparently recognizing the unsoundness of its own result, however, the Court conceded, "Admittedly, this argument may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement... but the course charted out by Chaussard compels our decision." Id.

## REASONS FOR GRANTING THE WRIT

**THIS CASE PROVIDES AN IMPORTANT OPPORTUNITY TO RESOLVE A DIRECT, DECISIONAL CONFLICT AMONG THE COURTS OF APPEALS ON A COMITY ISSUE OF MAJOR IMPORTANCE WHICH HAS DISRUPTED THE UNIFORM ADMINISTRATION OF FEDERAL HABEAS CORPUS LITIGATION**

Embodying a carefully-conceived balance of sovereign interests, the federal habeas corpus exhaustion doctrine requires that state courts receive a "full, fair" and genuine opportunity to review the merits of alleged constitutional violations before federal review is permitted. See, Pitchess v. Davis, 421 U.S. 482 (1975); Picard v. Connor, 404 U.S. 270 (1971). In a context not yet directly addressed by this Court, the Third Circuit has contrarily chosen, instead, to allow technical, not substantial, compliance with exhaustion requirements. The result is a direct split among

the circuits, both in policy and result. Review by this Court is essential.

If the Third Circuit's erroneous position is not corrected, an unjustifiable intrusion into state judicial proceedings will remain unremedied. If the conflict in the circuits is not resolved, contradictory habeas corpus results will proliferate. Neither result should be permitted to occur.

Unquestionably, respondent's refusal to follow reasonable state procedures denied the state courts a fair opportunity to review the merits of his habeas claims. Pennsylvania law requires claims to be raised throughout the course of an appeal for them to be reviewable by the state's highest court. Moreover, while newly-arising ineffective assistance of counsel claims must be raised in the appellate courts in order to preserve the claims, their resolution, except in rare

cases, must await development of a factual record at the trial court level.

Many of respondent's claims were, thus, procedurally unreviewable by the Supreme Court on direct review, i.e., the claims abandoned in the courts below were defaulted, the claims of the ineffective assistance of counsel were not ripe for decision for lack of factual development. Moreover, for the reasons stated above, the state Supreme Court also could not reach the merits of respondent's apparent justification for his various appellate defaults, i.e., the ineffective assistance of appellate counsel.

State litigation of respondent's habeas corpus claims, however, was not barred by the Supreme Court's disallowance

of discretionary review.[11] The effect of the Supreme Court's ruling was to open the

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[11]Indeed, respondent's position to the Third Circuit was that, since no procedural bar had been expressly applied by the state's highest court, the federal court could not refuse review of the merits on the ground of procedural default. The Third Circuit panel, while not ruling on the issue, seemed inclined to accept that position and, most remarkably, to regard federal review of the merits of respondent's claims as an appropriate next step. See, Appendix, 13A-14A.

The court's reliance on Klein v. Harris, 667 F.2d 274, 284-85 (2d Cir. 1981), accounts for the error in the Third Circuit's conclusion. The Second Circuit disagrees with the Third Circuit rule at issue presently, and requires that claims be presented in full accord with state procedures. See, infra at 22-24. Given the state's full opportunity to apply a procedural bar, the Second Circuit will accept only an express application of a state bar in order to preclude federal review. Such a rule is wholly inappropriate where the state is not afforded that full and fair opportunity, such as occurs, now, in the Third Circuit. The result, in the Third Circuit, is the creation of a "loophole", where none existed before, through which state review is readily bypassed at the convenience of the applicant. See, infra at 21-22, 24.

state's post-conviction remedy to respondent, for the purpose of preparing an evidentiary record, and obtaining factual findings, to determine whether the state's procedural bars should be enforced and to dispose of the ineffective assistance of counsel claims arising on appeal. Respondent declined to take that step, however; he elected, instead, to seek federal review.

The Third Circuit's erroneous grant of federal review in these circumstances ignored respondent's plainly apparent circumvention of state review. Incredibly, the windfall of federal review was granted respondent, and others like him, because of their violation of state procedures. The Third Circuit refused to defer to state court procedures; its approach can only encourage disrespect for, and violation of, those procedures.

See, Murray v. Carrier, ___ U.S. ___, 106 S.Ct. 2639 (1986).

To reach its extraordinary result, the Third Circuit wrongly relied on this Court's decision in Smith v. Digmon, supra, a case in which, contrary to the instant situation, claims were raised properly in the state system. See, Chaussard v. Fulcomer, supra, 816 F.2d at 928. Accordingly, the Third Circuit, overlooking the important policy considerations raised in cases like the present one, made the mere presentation of claims, however token, the touchstone of federal review.[12]

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[12] In Chaussard, the Third Circuit treated its decision as a simple application of the rule that discretionary review has the same exhaustion consequences as an appeal as of right. Chaussard v. Fulcomer, 816 F.2d at 928.

Petitioner does not dispute the
(Footnote Continued)

Inevitably, the Third Circuit rule will promote forum-shopping as a viable appellate strategy, notwithstanding this Court's express repudiation of the practice. Murray v. Carrier, supra, 106 S.Ct. at 276 ("Nor do we agree that the possibility of 'sandbagging' vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful"). By the simple expedient of presenting designated claims in a defaulted

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(Footnote Continued)
general principle that a request for discretionary review, of claims properly raised, will satisfy federal habeas corpus requirements. Petitioner's objection, however, is to the Third Circuit's conclusion that a state's adherence to its reasonable procedures is a mere act of discretion, entitled to no federal deference.

and unreviewable form to the state's highest court, an applicant may deftly deprive the state of its right to initial review and obtain federal review. Review in such circumstances is unaided by state factual findings or pertinent explication of its law. This Court must not permit fundamental state interests to be defeated by such transparency.

The other circuits, seven (7) in all, which have addressed the identical question, have unequivocally rejected the Third Circuit approach as violative of fundamental comity concerns. The Seventh Circuit persuasively stated:

> [T]he Indiana Supreme Court presumably could have chosen to ignore its procedural rule and passed on the merits of the constitutional issue. It cannot be said, however, that that court should be <u>required</u> to ignore its own procedures. "If a petitioner wishes to exhaust his claims, he is expected not only to use the normal avenues of relief but also to present his claims before the courts in a procedurally proper manner according to the rules of the state

> courts." [citation omitted]... The exhaustion rule is a rule of comity which recognizes that, while it is necessary for the federal courts to be available to protect the rights of state prisoners, it is also necessary that state courts be permitted to function without undue interference.

Wallace v. Duckworth, 778 F.2d 1215, 1223 (7th Cir. 1985) (emphasis added). Similarly, the Ninth Circuit, when confronted with the identical issue, stated that it "need not find that the Oregon Supreme Court lacked jurisdiction to hear the claim," but only that the procedural posture in which the claim was presented was not a fair opportunity for decision. Kellotat v. Cupp, 719 F.2d 1027, 1031 (9th Cir. 1983). Similar results were reached by the Fifth Circuit, the Eighth Circuit, the Sixth Circuit, the First Circuit, and the Second Circuit.[13]

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[13] Brown v. Estelle, 530 F.2d 1280
(Footnote Continued)

At present, applicants in other circuits who default in state court as respondent has will be denied federal review on exhaustion grounds. Respondent, and others like him in the Third Circuit, however, will receive that review. This situation should not be perpetuated.[14]

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(Footnote Continued)
(5th Cir. 1986); see also, Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982); William v. Wyrick, 763 F.2d 363 (8th Cir. 1985); see also, Diamond v. Wyrick, 757 F.2d 192 (8th Cir. 1985); Bandy v. United States, 628 F.2d 935 (6th Cir. 1980); Dickerson v. Walsh, 750 F.2d 150 (1st Cir. 1984); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981).

[14]Adding further confusion to Third Circuit habeas corpus litigation, an intra-circuit conflict has arisen; a recent panel decision dismissed a petition for further state development of an ineffective assistance of counsel claim. O'Halloran v. Ryan, 835 F.2d 506 (3d Cir. 1987). While the O'Halloran holding accords with the congressional mandate of 28 U.S.C. §2254(c), application of the Chaussard exhaustion rule produces the contrary result reached by the panel in the present case. Such divergent results engender confusion and foster dissimilar

(Footnote Continued)

The inequity in the administration of habeas corpus litigation resulting from the Third Circuit's approach requires the immediate attention of this Court. It is equally imperative that this Court grant review to rectify the impermissible imbalance of sovereign interests imposed by the Third Circuit's erroneous ruling.

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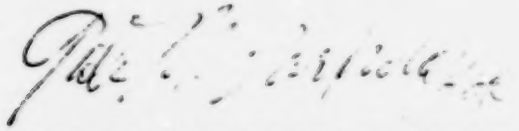
(Footnote Continued)
application of the exhaustion doctrine at the district court level. This Court's review is thus also required to reconcile the intra-circuit conflict and ensure its uniformity of decisions.

## CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania, through the named petitioners, respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 87-1247

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PEOPLES, MICHAEL,

Appellant

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA AND THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

---

Appeal From the United States District Court For the Eastern District of Pennsylvania D.C. Civil No. 86-4458

---

Argued December 7, 1987

Before: GREENBERG, SCIRICA, and HUNTER, Circuit Judges

Opinion filed December 30, 1987

---

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OPINION OF THE COURT

PER CURIAM:

1. Appellant Michael Peoples seeks a writ of habeas corpus. The District Court, adopting the report and recommendation of a U.S. Magistrate, dismissed his petition on the grounds that Peoples had not exhausted his state remedies.

I. BACKGROUND

2. Following a jury trial in the Philadelphia Court of Common Pleas in 1981, Peoples was convicted of arson, endangering persons, aggravated assault and robbery. His post-verdict motions for a new trial were denied, and the conviction was affirmed by the Pennsylvania Superior Court in September, 1983. The following month, Peoples filed in the Pennsylvania Supreme Court a pro se "Petition for Allowance to File Appeal to Review Errors of the Superior Court with

Appointment of New Counsel" ("pro se petition"). The Supreme Court granted the request for appointment of counsel "to assist [Peoples] in filing a Petition for Allowance of Appeal," but did not discuss the merits of the claims raised in the pro se petition. Appendix at 170a. Peoples's new counsel filed a Petition for Allowance of Appeal ("counseled petition") in June, 1985. The counseled petition was denied without opinion on November 4, 1985.

3. Prior to the denial of allocatur in 1985, Peoples had filed two petitions for writ of habeas corpus in federal District Court, each of which was denied for failure to exhaust state remedies. Peoples filed the current petition for habeas corpus on July 28, 1986. The matter was referred to Magistrate Naythons, and the Philadelphia District Attorney filed a response contending that Peoples had not exhausted his state

remedies. In his pro se reply to the response, Peoples directed the court's attention to his pro se petition for allocatur, and argued that that petition, considered with other relevant documents, showed he had satisified the exhaustion requirement.

4. The Magistrate's Report and Recommendation that the writ be denied was filed on April 2, 1987. The report, which made reference to the counseled petition for allocatur but did not mention the pro se petition, stated that Peoples had not exhausted state remedies. In particular, the Magistrate referred to several claims that were missing from the counseled petition for allocatur as the basis for finding a lack of exhaustion. The parties are in dispute as to whether these claims are sufficiently raised in the pro se petition which the Magistrate did not consider.

5. The District Court approved and adopted the Magistrate's report and recommendation and denied the writ on April 17, 1987, three days before People's deadline for filing objections to the report. Peoples timely field his objections on April 20. The court filed a new order the following day which denied the objections to the Magistrate's report and again denied the petition for writ of habeas corpus. Peoples filed a petition for certificate of probable cause to appeal to this court on April 28, 1987. This court granted the request on June 3, 1987. We will now reverse based upon our recent decision in Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir. 1987). In Chaussard, this court found that a prisoner had satisfied the exhaustion requirement by filing a pro se petition for allocatur in the Supreme Court.

## II. DISCUSSION

6. Peoples raises two claims on appeal. He first claims that he has sufficiently exhausted state court remedies for purposes of the federal habeas corpus statute, 28 U.S.C. §2254 (1982). Second, Peoples asserts that if he is found not to have exhausted his state court remedies, his failure should be excused because further resort to the state courts would be futile.

7. The second issue is easily disposed of. He bases this assertion on the fact that "the inordinate delay which would be required to exhaust those remedies would render those remedies inadequate." Appellant's brief at 38. While it is true that exhaustion is not required where the attempt would be futile, see 28 U.S.C. §2254(b), there is simply no basis for this court to rule as a matter of law that the state courts of Pennsylvania are

unable to afford adequate relief because of inordinate delay.

8. Turning to the question of whether all the claims are exhausted, we first note that in this case our review is plenary, Chaussard, 816 F.2d at 927. In his current petition for habeas, Peoples asserts that he was denied due process under several theories, each of which has a slightly different procedural history in the state courts:

1. The prosecutor questioned the defendant on unrelated crimes.

2. Defendant's denial (sic) for a non-jury trial was denied.

3. Identification procedures were unnecessarily suggestive.

4. Peoples had ineffective assistance of counsel, in that counsel failed to:

   a. file motions to suppress evidence obtained through an illegal arrest, search and seizure; and

   b. object to the admission of unrelated crimes.

Each of these claims must be exhausted in order for the petition to satisfy the requirements of 28 U.S.C. §2254(b). See Rose v. Lundy, 455 U.S. 509 (1982); Chaussard, 816 F.2d at 927. The question of whether each has been exhausted is therefore discussed individually below. Before turning to the individual claims, however, there is a preliminary question as to whether the pro se allocatur petition should be included in the procedural history of any claim.

A. The Pro Se Allocatur Petition.

9. A petition for allocatur to the state Supreme Court can suffice to satisfy the exhaustion requirement. Chaussard, supra. In this case, as in Chaussard, there were two different allocatur petitions: the pro se petition and the counseled one. The difference between this case and Chaussard is that, unlike the latter case, the pro se petition in this

case was captioned "Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of Counsel." See Appendix at 132a-40a. Appellees argue that this petition should not be considered for purposes of exhaustion because it was a request for counsel rather than for relief; as such, it did not give the Supreme Court a fair opportunity to review the substantive claims. Appellees' brief at 10-11.

10. The proper characterization of the pro se petition is a close question on which there seems to be no controlling law. However, it seems that the Supreme Court had just as much discretion to review the merits of the petition here as it did in the Chaussard case. To begin with, the petition looks much more like a request for allocatur than a request for counsel: with the exception of the tail-end of the captien and part of the final

sentence, the petition is concerned entirely with allocatur. In fact, the relief requested in the petition is for both the grant of allocatur and the appointment of counsel. Appendix at 138a. Thus, the closest procedural analogy to the Supreme Court's disposition of the petition would be a dismissal without prejudice: Peoples was granted an order for the appointment of counsel, but was told that his request for allocatur must be refiled within thirty days. While this might have been the most prudential course for the Supreme Court, it was within their discretion to grant relief on the merits. That they chose not to exercise that discretion should not keep Peoples out of federal court.

11. Admittedly, this argument may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement. The Pennsylvania

Supreme Court exercised its discretion in such a way as to avoid deciding an issue before it was presented by counsel; once a counseled petition had been filed, it would have been improper to consider the claims raised in the pro se petition but not the counseled one. And yet those choices seem sufficient to allow a federal court to hear the merits of Peoples's petition. It may be argued that this result is inconsistent with the principle of comity, but the course charged out by Chaussard compels our decision here. This court's prior decision in Chaussard makes it impossible for us now to ignore the pro se allocatur petition in this case.

B. Exhaustion of Specific Claims.

1. Improper Cross Examination.

12. This claim was raised in the post-trial motions, in the brief before the Superior Court, and in the pro se petition for allocatur; it was not raised

in the counseled petition. Given our holding that the pro se petition is properly considered part of the procedural history of this claim, the exhaustion requirement is satisified.

2. Denial of Non-Jury Trial.

13. This claim was raised in the post-trial motions, but not in the brief before the Superior Court. The claim was resurrected in the pro se petition for allocatur but then left out of the counseled claim. Assuming again that the pro se petition is relevant, the exhaustion requirement may be deemed satisified under Chaussard. Since the Supreme Court gave no indication that it would refuse to hear the non-jury trial claims because of the procedural defect of not raising it before the Superior Court, Chaussard would suggest that inclusion of the claim in the petition for allocatur is sufficient. See

Klein v. Harris, 667 F.2d 274, 284-85 (2d Cir. 1981).

3. Tainted Identification Procedures.

14. This had essentially the same procedural history as the first claim about the improper cross-examination, and should be considered exhausted for the same reasons.

4. Ineffective Assistance of Counsel.

15. Peoples raised two ineffective claims in his habeas petition. The first stated that he had been denied effective assistance because his attorney had failed to seek suppression of the fruits of the arrest. Appellant's brief to this court asserts that his claim was made for the first time "in terms of the ineffective assistance of appellate counsel in the counselled Petition" Appellant's brief at 37 (citing Appendix at 41a-42a). This would not support a finding of exhaustion, since a claim that trial counsel was

ineffective is not the same as a claim that appellate counsel failed to assert viable theory on appeal. However, a fair reading of the pro se allocatur petition, Appendix at 136a-37a, shows that Peoples did raise the ineffectiveness of trial counsel in that document. Thus under the reasoning set out above, this claim has been exhausted.

16. The second ineffectiveness claim, that counsel failed to object to admission of unrelated crimes, was raised only in the pro se petition; it was not mentioned in the post-trial motions, the brief before the Superior Court, or the counseled petition. Thus, like all the other claims, the issue of exhaustion turns on whether the pro se petition is a relevant document; since we hold that it is, this claim has been exhausted.

## CONCLUSION

17. Because we find that appellant Peoples has satisfied the exhaustion requirement of 28 U.S.C. §2254, we will reverse the decision of the District Court and remand for a hearing on the merits of the habeas petition.

TO THE CLERK
Please file the foregoing opinion.

Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-1247

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PEOPLES, MICHAEL,

Appellant

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

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D.C. Civ. No. 86-4458

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SUR PETITION FOR REHEARING

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BEFORE: GIBBONS, Chief Judge, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, and HUNTER, Circuit Judges.

The petition for rehearing filed by appellees in the above-entitled case

having been submitted to the judges who participated in the decision of this court and to the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

_____
Circuit Judge

Dated: January 25, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| MICHAEL PEOPLES | : | CIVIL ACTION |
| VS. | : | |
| THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY | : | |
| AND | : | |
| THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA | : | NO. 86-4458 |

ORDER

MARVIN KATZ, J.

NOW, this 17th day of April, 1987, after careful and independent consideration of relator's petition for a writ of habeas corpus and after review of the Report and Recommendation of the United States Magistrate, it is ORDERED that:

1. The Report and Recommendation is Approved and Adopted.

2. The petition for writ of habeas corpus is Denied and Dismissed without prejudice for failure to exhaust state remedies.

3. Petitioner's motion for state court trial transcripts is Denied.*

4. There is no probable cause for appeal.

\s\
MARVIN KATZ, J.

*Petitioner may renew this request if he files P.C.H.A. proceedings before the State Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| MICHAEL PEOPLES | : | CIVIL ACTION |
| V. | : | |
| THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY | : | |
| and | : | |
| THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA | : | NO. 86-4458 |

ORDER

AND NOW, this 21st day of April, 1987, it is hereby ORDERED that the petition for writ of habeas corpus is DENIED and DISMISSED without prejudice for failure to exhaust state court remedies. The petitioner's objections to Magistrate Naython's Report and Recommendation are also DENIED. It is further ORDERED that petitioner's motion for this Court to provide him with a complete copy of the state court trial transcripts in

Commonwealth v. Peoples is DENIED. There is no probable cause for appeal.

BY THE COURT:

MARVIN KATZ, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MICHAEL PEOPLES | : | CIVIL ACTION |
| VS. | : | |
| THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY | : | |
| AND | : | |
| THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA | : | NO. 86-4458 |

REPORT - RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE APRIL 1, 1987

Michael Peoples, an inmate currently incarcerated at the State Correctional Institution in Huntingdon, Pennsylvania has filed a pro se petition for a writ of habeas corpus. Petitioner was convicted of arson endangering persons, aggravated assault, and robbery following a jury trial before the Honorable James T. McDermott on January 16, 1981. On April 28, 1981, petitioner was

sentenced to a total of fifteen to forty (15-40) years imprisonment with a concurrent ten year probation.

On June 8, 1982, Judge Charles P. Mirarchi, Jr., of the Court of Common Pleas filed a written opinion concerning the denial of petitioner's post-trial motions, followng the election of the Honorable James T. McDermott to the Pennsylvania Supreme Court in November of 1981. Among petitioner's post-trial motions was a claim that he was improperly denied a bench trial. This claim was never appealed after the initial denial by Judge Mirarchi.

Petitioner filed a direct appeal to the Pennsylvania Superior Court on May 11, 1983. The Superior Court affirmed the judgment of sentence on September 16, 1983. Commonwealth v. Peoples, 466 A.2d 720 (Pa. Super. 1983). The Superior Court rejected petitioner's claim that the

Suppression Court erred in failing to suppress identification testimony. Petitioner never appealed this ruling by the Superior Court.

On June 7, 1985, petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court. Among the issues raised in this petition, was whether appellant counsel was ineffective for failing to raise in his appeal that trial counsel was ineffective in failing to preserve the issue; that the prosecutor committed reversible error in cross-examining petitioner as to his prior criminal record in violation of 42 Pa.C.S.A. §5918. Petitioner's Allocatur appeal was denied on November 4, 1985.[1]

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[1]This is petitioner's third petition for a writ of habeas corpus. By Order dated December 5, 1984, petitioner's first petition was denied for failure to exhaust
(Footnote Continued)

## DISCUSSION

A petition for a writ of habeas corpus by a state prisoner will not be entertained by a federal habeas corpus court unless available state court remedies have been exhausted. 28 U.S.C. §2254(b), (c); Rose v. Lundy, 455 U.S. 509 (1982). Absent highly unusual circumstances the Court may not consider the merits of petitioner's claims unless he has exhausted his remedies with respect to each. Patterson v. Cuyler, 729 F.2d 925, 929 (3d Cir. 1984); Santana v. Fenton, 685 F.2d 71, 74 (3d Cir. 1982), cert. denied,

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(Footnote Continued)
state court remedies, Civil Action No. 84-4061, following this U.S. Magistrate's Report and Recommendation of November 15, 1984. Petitioner's second petition for a writ of habeas corpus was denied for failure to exhaust state court remedies on July 15, 1985 when the District Court approved and adopted this U.S. Magistrate's Report and Recommendation of June 27, 1985, Civil Action No. 85-2031.

459 U.S. 1115 (1983). The exhaustion doctrine is designed primarily to protect the state court's role in enforcement of federal law and to prevent disruption of state judicial proceedings. Rose, 455 U.S. at 518; Slotnick v. O'Lone, 683 F.2d 60 (3d Cir. 1982), cert. denied, 459 U.S. 1211 (1983).

A federal habeas corpus court will not hear a constitutional claim for the first time unless petitioner demonstrates cause for the failure to properly present the claim to the state courts and prejudice resulting therefrom. Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977), reh. denied, 434 U.S. 880 (1977). "An exception [to the exhaustion requirement] is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain

relief." Duckworth v. Serrano, 454 U.S. 1, 3 (1981).

Petitioner's first claim of prosecutorial misconduct, is based upon the prosecutor's cross-examination of petitioner as to his prior criminal record. Petitioner relies on 42 Pa.C.S.A. §5918 as support for his claim. The only opportunity the Pennsylvania Court's were given to address this claim was on petitioner's Allocatur appeal to the Pennsylvania Supreme Court. In that appeal petitioner alleged ineffectiveness of appellate counsel for failing to raise this issue and for not raising trial counsel's ineffectiveness in failing to preserve this issue.

The Pennsylvania Supreme Court has refused to consider as finally litigated on its merits, an issue raised solely in an allocatur appeal. Commonwealth v. Tarver, 493 Pa. 320, 426, A.2d

569 (1981). An issue not raised in the lower courts is considered waived and cannot be raised for the first time on appeal. Pa.R.A.P. 302(a).

Since the record is void of any indication that the Pennsylvania Courts were properly presented with this issue and ruled on petitioner's claim of prosecutorial misconduct, this U.S. Magistrate cannot conclude that this claim has been exhausted. The procedurally correct way for petitioner to assert the issue of ineffectiveness of counsel and prosecutorial misconduct which has not been previously litigated is to file a petition for relief under Pennsylvania's Post Conviction Hearing Act, 42 Pa.C.S.A. §§9541 et seq.

Petitioner's second claim is that he was unconstitutionally denied a bench trial. While this claim was raised in post-verdict motions, it was never

brought before an appellate court for review. Petitioner must show cause for the failure to present this claim to the state courts and prejudice resulting therefrom, before a federal habeas court will consider this claim. Wainwright, 433 U.S. 72.

Petitioner may assert ineffectiveness of counsel as the cause for his failure to properly present claims to the state courts. However, while these grounds for relief remain open it would be improper for this federal habeas court to consider petitioner's ineffectiveness of counsel claim to show cause for a procedural default. "If a petitioner could raise his ineffectiveness claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim, for

which state court review might still be available. Murray v. Carrier, ____U.S. ____, 106 S.Ct. 2639, 2646 (1986).

Petitioner asserts that his identification in court was not admissible as it was a result of illegal and suggestive police procedures. While this claim was raised and denied on its merits before the Pennsylvania Superior Court, it was abandoned on allocatur. Consistent with Wainwright, supra the failure to preserve the claim bars federal consideration absent a showing of cause for the default and prejudice resulting therefrom. Petitioner has not demonstrated such to this Court. If petitioner intends to asserts ineffectiveness of counsel as "cause," he must return to the State Courts.

Petitioner also claims that trial counsel was ineffective for failing to file a motion to suppress evidence

obtained by an illegal arrest, and that appellate counsel was ineffective in asserting it. These claims were raised for the first time in petitioner's allocatur petition to the Supreme Court. Since this U.S. Magistrate cannot conclude that the Pennsylvania Supreme Court did or would consider the merits of such a claim presented for the first time in an allocatur petition, as previously discussed, these claims cannot be considered by this Court. Petitioner must assert these claims in an action under the Post Conviction Hearing Act.

Petitioner's final claim of trial counsel's ineffectiveness, for failure to object to evidence that petitioner changed his appearance before a line-up, was raised for the first time in this petition for habeas corpus. Therefore, it is clear that petitioner failed to exhaust his state court remedies with

respect to this issue. See, Rose, supra; 28 U.S.C. §2254(b).

Petitioner has also filed a request for this Court to provide him with the trial transcripts in Commonwealth v. Peoples. Petitioner has failed to state any reasons for such other than his need to reply to respondent's answers to the habeas corpus petition.

The touchstone of an indigent's motion for a transcript are need and relevance. United States ex rel. Williams v. State of Delaware, et al., 427 F.Supp. 72, 76 (D.Del.1976). Indigents are not entitled to a transcript of the trial proceedings for use in habeas corpus matters without a showing of need. Towler v. Peyton, 303 F.Supp. 581, 583 (W.D.Va. 1969); citing United States v. Shoaf, 341 F.2d 832 (4th Cir. 1964); United States v. Glass, 317 F.2d 200 (4th Cir. 1963). Petitioner has not demonstrated the need

for the trial transcripts, especially in light of this Court's findings that petitioner failed to exhaust his existing state remedies in claims raised in his habeas petition. It is noted that petitioner's grounds raised in his habeas corpus petition allege no deprivation of requested transcripts or errors contained in the records; indeed he makes no reference to the need for the transcripts at any time.

Accordingly, this United States Magistrate makes the following.

RECOMMENDATION

NOW, this 2nd day of April, 1987, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be Denied and Dismissed without prejudice for failure to exhaust state court remedies. IT IS FURTHER RECOMMENDED that petitioner's motion for this Court to provide him with a complete copy of the state court

trial transcripts in Commonwealth Peoples be Denied. There is no probable cause for appeal.

\s\
EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

No. 87-1602

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

RONALD D. CASTILLE, District Attorney
of Philadelphia County
THOMAS FULCOMER, Superintendent
Huntingdon State Correctional
Institute; and
LEROY ZIMMERMAN, Attorney General
of Pennsylvania,

Petitioners,

v.

MICHAEL PEOPLES,

Respondent.

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# BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Philadelphia, PA 19102
(215) 563-0650

Attorney for Respondent
Michael Peoples

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## TABLE OF AUTHORITIES

## COUNTER-STATEMENT OF THE CASE

Respondent raised the following claims in his federal habeas corpus petition (App. at 4a)[1]:

1. That he was improperly impeached with two prior robbery convictions and a theft conviction, in violation of his rights under the due process clause;

2. That the manner in which he was deprived of a non-jury trial violated his rights under the due process clause;

3. That suggestive pre-trial identification procedures were used; and,

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[1]Citations to the appendix are to the appendix in the court of appeals unless otherwise noted.

4. That he was denied the effective assistance of counsel based on:

a. trial counsel's failure to properly move to suppress the fruits of an illegal arrest; and,

b. trial counsel's failure to object to evidence of unrelated criminal acts.

The record in the courts of the Commonwealth of Pennsylvania is as follows: First, the due process claim based on the impeachment use of prior convictions was raised in the Superior Court of Pennsylvania (App. at 104a-106a) and in a pro se request for discretionary review[2] (labelled "Pro Se Petition for

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[2]The applicable rules of the Supreme Court of Pennsylvania provide for the filing of a petition for allowance of



Allowance to File Appeal to Review Errors of Superior Court with Appointment of New Counsel) filed in the Supreme Court of Pennsylvania (App. at 163a). This pro se petition was timely filed and by its own terms, constituted a request substantive review and for the appointment of counsel. Rather than address the merits of the pro se Petition for review, the Supreme Court of Pennsylvania appointed counsel to file a new petition for allowance of appeal (App. at 170a). Later, after the counselled petition was filed, the Supreme Court entered an order denying it without elaboration (App. at 31a). No formal order was entered ruling on the merits of the pro se petition.

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appeal to invoke the court's discretionary jurisdiction. See Pa. Rule App. Pro 1111, et seq.

Second, the due process claim based upon the denial of a non-jury trial was raised in the trial court (App. at 166a), but was not raised in the Superior Court. It was raised in the pro se petition for review and the failure to raise the issue in the Superior Court was alleged to be caused by the ineffective assistance of prior appellate counsel. Specifically, the pro se petition alleged, as to the previous proceedings, that the petitioner therein was

> denied his Federal and State constitutional rights to have effective assistance of counsel during the State's first direct appeal...because court appointed counsel...failed to raise and argue meritorious claims of error during trial, at post-verdict and post-sentence levels and stages of this case and failed to raise and argue ineffectiveness of former counsel who represented this petitioner in the following errors which occurred to prejudice petitioner:



(App. at 163a). Thereafter, various claims are listed, including the claim of a denial of due process rights due to the manner in which Mr. Peoples was denied a non-jury trial (App. at 165a-66a), and the claim of ineffective assistance of counsel based on trial counsel's failure to object to evidence of other crimes (App. at 168a).

Third, the claim based upon identification procedures was raised in the Superior Court and the pro se petition for review.

Fourth, the ineffectiveness of trial counsel due to counsel's failure to properly seek suppression of the fruits of an arrest was not raised in the Superior Court but was raised in terms of the ineffective assistance of trial counsel and of appellate counsel in the

counselled petition for review (App. at 41a-42a). In the counselled petition, it was specifically alleged that the failure of prior appellate counsel to raise the issue was due to the "ineffectiveness" of "appellate counsel" (Id.).

The ineffectiveness claim based on trial counsel's failure to object to the evidence of unrelated criminal acts was not raised in the Superior Court brief but was raised in terms of the ineffective assistance of trial counsel and of appellate counsel in the pro se petition for review. It was specifically claimed in the pro se petition that the failure to raise the claim in the Superior Court was due to appellate



counsel's ineffective assistance (App. at 168a).[3]

## SUMMARY OF ARGUMENT

The petitioners incorrectly characterize the holding of the court of appeals in this case as establishing a rule that a state prisoner seeking federal habeas relief may establish the exhaustion of state remedies by demonstrating that the claims were previously presented to the state court of last resort, even if the claims were presented in a non-justiciable posture and in violation of state law. Here, petitioners allege that the failure to

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[3]It was alleged in the pro se petition that "appellate counsel [was] ineffective for failing to raise and argue use of prejudicial unrelated crimes evidence (App. at 168a).

raise certain claims in the Superior Court precluded review by the Supreme Court of Pennsylvania.

The petition should be denied because the petitioners have mischaracterized the holding of the court of appeals. All habeas claims were fairly presented to the state court of last resort for the following reasons.

First, as a matter of Pennsylvania procedure, respondent's claims were in a justiciable posture before the Pennsylvania Supreme Court, despite the fact that several were not raised in the Superior Court, because it was expressly alleged that the failure to raise the claims in the Superior Court was due to the ineffective assistance of prior appellate counsel. Under Pennsylvania law, the Supreme Court was to empowered



to address the merits and affirm, reverse on the record before it, or remand for further hearings.

Second, applying the cause and prejudice analysis articulated by this Court in Wainwright v. Sykes, 433 U.S. 72, 74 (1977), even if the petitioners could demonstrate that certain claims were arguably in a non-justiciable posture, there is no basis to find that the Pennsylvania Supreme Court declined to reach the merits of the claims on the basis of the alleged procedural defaults. Accordingly, the claims were exhausted even if there were a demonstrable means by which the state court could have avoided addressing the merits.

Third, although the third circuit's previous holding in Chaussard v. Fulcomer, 816 F.2d 925 (3d Cir.), cert.

denied, 108 S.Ct. 139 (1987), may arguably be construed to hold that defaulted claims are nonetheless exhausted, the record renders this case inappropriate for the review of such a holding since there was a clear means by which the Supreme Court of Pennsylvania could have reviewed the claims in this case.

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**REASONS FOR DENYING THE WRIT**

I. The Petition Should be Denied Because the Record Does not Give Rise to the Questions Presented in the Petitio

The petitioners incorrectly characterize the unpublished opinion of the court of appeals in this case as establishing a rule, in conflict with the decisions of other circuits and of this Court, that a state prisoner may exhaust his remedies for purposes of federal



habeas relief by presenting his claims to the state court of last resort in a non-justiciable posture; that is, in violations of state procedural requirements. The petitioners allege that the respondent committed procedural defaults rendering the Supreme Court of Pennsylvania unable to review his claims and argue that, as a result, the claims were not "fairly presented" to the state court of last resort. This purported holding, along with a similar holding in a previous third circuit case, Chaussard v. Fulcomer, also does violence to principles of federal/state comity and accordingly, the petitioners argue, the petition should be granted.

It is respectfully submitted that the petition should be denied on the ground that the court of appeals did not hold in

this case that exhaustion may be established through the presentation of claims in non-justiciable posture due to violations of state law. Rather, in conformity with idiosyncratic provisions of Pennsylvania appellate procedure, the Supreme Court of Pennsylvania had a fair opportunity to review the claims later made in the federal habeas petition. Thus, in accordance with other circuits and the decisions of this Court, the claims were exhausted.

The alleged procedural defaults which are the basis for petitioners' argument are not immediately clear on the face of the petition.[4] However, of the four

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[4]Petitioners do not appear to contend in this Court that the pro se petition in the Supreme Court may not be considered in determining exhaustion. The pro se petition was timely and complied with the applicable rules.



habeas claims, the petitioners appear to contend the claim of a due process violation based on the manner in which the respondent was deprived of a non-jury trial was made in the state trial court but was not made in the Superior Court of Pennsylvania. In addition, it is contended that the two ineffectiveness of trial counsel claims (failure to properly move to suppress the fruits of an arrest and failure to object to the admission of evidence of unrelated crimes) were not presented in the Superior Court. The Supreme Court of Pennsylvania was thus not empowered to address the claims and, accordingly, petitioners argue, the claims were not fairly presented to the court.

Although respondent agrees that abandonment in the Superior Court could,

as a general rule, preclude Supreme Court review, here Pennsylvania's exception to the abandonment rule based on the ineffective assistance of counsel nonetheless provided the Supreme Court of Pennsylvania with an opportunity to review the merits of the claims, either on the record before it, or on a record to be made upon remand.

In general, in the federal appellate courts, as well as in the Pennsylvania appellate courts, an appellate court will not review a matter raised before it for the first time or abandoned in a lower court. See United States v. Schreiber, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979); Commonwealth v. Piper, 458 Pa. 307, 328 A.2d 845 (1974). However, Pennsylvania permits and indeed requires that the issue of the



ineffectiveness of counsel be raised at the earliest stage of the proceedings at which the allegedly ineffective lawyer no longer represents the defendant. Commonwealth v. Webster, 490 Pa. 322, 416 A.2d 491 (1980).

In the courts of Pennsylvania, where the claim is made that earlier counsel has been ineffective and the Supreme Court or Superior Court can evaluate the merits of the claim on the basis of the existing record, the court can resolve the merits of the claim and affirm the conviction. See Commonwealth v. Johnson, 479 Pa. 60, 387 A.2d 834 (1978) (Supreme Court affirms conviction, reaching the merits of an ineffectiveness claim); Commonwealth v. Tessel, 347 Pa. Super. 37, 53, 500 A.2d 144, 152 (1985) (new counsel raises ineffectiveness claim for

the first time on appeal; affirming on the merits, the Superior Court states, "[t]he claim is ... properly before us.").

When the merits of the ineffectiveness claim, raised for the first time on appeal, are not apparent on the record, the Pennsylvania appellate courts may remand the case to the trial court for the purpose of a hearing on the merits. See Commonwealth v. Murphy, 316 Pa. Super. 178, 182, 462 A.2d 853, 855 (1983) (remand to Court of Common Pleas for hearing and a decision); Commonwealth v. Jellots, 277 Pa. Super. 358, 363, 419 A.2d 1184, 1187 (1980) (same). While there is no requirement that a collateral attack be mounted under the Pennsylvania



Post Conviction Hearing Act ("PCHA")[5], the appellate court may, in its discretion, decline to address the issue, without prejudice to accused's right to raise the claim in a collateral attack under the PCHA statute. There is no known authority establishing when the Supreme Court of Pennsylvania is required to maintain jurisdiction and remand for hearings, or to decline to assert jurisdiction in lieu of a PCHA proceeding.

The case of Commonwealth v. Hubbard, 472 Pa. 259, 372 A.2d 687 (1977), appeal after remand, 485 Pa. 353, 402 A.2d 999 (1979), is instructive and demonstrates the manner in which the Supreme Court of

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[5]The Post Conviction Hearing Act (42 Pa. C.S. §9541, et seq.) establishes a means by which errors may be remedied on collateral attack.

Pennsylvania may review claims such as those asserted by respondent. In Hubbard, the defendant was convicted of murder in the trial court and on direct appeal contended that post-trial counsel[6] was ineffective because his post-verdict motions failed to raise a claim of ineffective assistance of trial counsel based on the latter's failure to object to certain prejudicial statements made in the prosecutor's closing. After finding the contention to be of "arguable merit," the Supreme Court vacated the judgment of sentence and remanded the case for an evidentiary hearing. 485 Pa. at 356, 402 A.2d at 1000. Upon

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[6]Hubbard was represented at trial by retained counsel (trial counsel), a public defender who filed supplemental post verdict motions (post-trial counsel), and on direct appeal by another public defender (appellate counsel).



completion of the hearing and the entry of an adjudication by the trial court, the matter was placed directly before the Supreme Court which affirmed the conviction, 485 Pa. at 358, 402 A.2d at 1000-01.

Finally, when the merits of a claim of ineffective assistance of counsel are susceptible to review on direct appeal, the Supreme Court may resolve the merits and reverse the judgment of sentence. Commonwealth v. Morin, 477 Pa. 80, 383 A.2d 832 (1978). In Morin, the defendant's first counsel failed to raise the issue of the defendant's waiver of a jury trial in post-verdict motions and before the Superior Court. In the Supreme Court of Pennsylvania new counsel raised the issue in terms of ineffective assistance of counsel. Rejecting the

prosecution's argument that the case should be remanded for a hearing on the matter, the Supreme Court resolved the merits of the claim, reversing the judgment of sentence and remanding the case for a new trial. 477 Pa. at 88, 383 A.2d at 835.

Here, respondent specifically alleged in his pro se request for discretionary review before the Supreme Court of Pennsylvania that all of his claims, including the due process claim based on the denial of a non-jury trial and the ineffectiveness of trial counsel claim based on the failure to object to evidence of unrelated crimes, were omitted from the Superior Court submission of prior counsel due to counsel's ineffectiveness. Similarly, the ineffectiveness claim based on trial



counsel's failure to properly move to suppress the fruits of an arrest was specifically raised in the counselled petition for review and the failure to raise it in the Superior Court was alleged to constitute the ineffective assistance of appellate counsel. Under the exception to the abandonment rule described in Hubbard and Morin, supra, the Supreme Court of Pennsylvania was empowered to adjudicate the merits of the claims. Accordingly, the Supreme Court had a fair opportunity to review the merits of the claims on direct appeal.

II. Under the Cause and Prejudice Analysis Articulated by This Court In Wainwright v. Sykes The Habeas Claims were Exhausted

Under this Court's decision in Wainwright v. Sykes, 433 U.S 72 (1977), when the claim is made that a habeas

claim is not exhausted because, as a matter of state law, the claim was abandoned either at trial or on appeal and thus was unreviewable by the state court of last resort, the habeas court must make two determinations. See Klein v. Harris, 667 F.2d 274, 285 (2d Cir. 1981). First, the habeas court must determine whether the state court relied upon the procedural default in declining to grant relief. Second, if the state court did so rely, the habeas court must consider whether there was adequate cause for the default and sufficient resulting prejudice to the accused to satisfy the Sykes standard. Id. Before this analysis is undertaken, it is necessary to determine whether the state court actually invoked the procedural default as a bar to the granting of relief. Id.



Here, there is no basis to believe or contention that the Supreme Court of Pennsylvania invoked any alleged procedural default as a bar to review since that court simply denied review without comment or elaboration (App. at 31a). Accordingly, the alleged procedural default may not be presumed to have defeated review and may not be used to defeat exhaustion in the habeas court.

## III. This Is Not the Appropriate Case to Review the Third Circuit's Holding in Chaussard v. Fulcomer

The petitioners point to the third circuit's reliance in this case on a previous decision of Chaussard v. Fulcomer, supra,[7] and contend that

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[7]In Chaussard, the district court dismissed on exhaustion grounds and the third circuit reversed, finding that the claims were exhausted. The third circuit then considered the merits of the claims,

Chaussard makes clear that the third circuit will find exhaustion in a clear case of an abandonment of a claim in the Superior Court of Pennsylvania, even to an abandonment as to which the ineffectiveness of counsel exception is not applicable.

In Chaussard, the respondents to the habeas petition contended that two of the four federal habeas claims had been abandoned in the Superior Court, precluding review in the Supreme Court of Pennsylvania, even though the abandoned claims were pressed in a request for discretionary review in the latter court. Id. at 927-28. Without any discussion of whether abandonment precluded review in

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and on that basis, affirmed the order of dismissal. The habeas petitioner then unsuccessfully sought review of the third circuit's holding on the merits of the claims.



the state court, the third circuit held that the claims were exhausted because they were raised in one of two petitions for discretionary review in the Supreme Court of Pennsylvania.[8]

Even assuming that two of the four habeas claims were not raised in the Superior Court, this case does not present the issue. Although these facts are not discussed in the opinion in Chaussard, counsel for the respondent reviewed the record in Chaussard and informed the third circuit panel at oral argument in this case that the two claims appeared to have been abandoned in Chaussard. However, to the extent Chaussard may be read to establish a rule

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[8]Chaussard is similar to this case in that pro se petitions for review, followed by counselled petitions for review, were filed in both cases.

that claims presented to the state court of last resort in a non-justiciable posture, the respondent in this case has not and does not rely on it. Rather, respondent has consistently contended that the claims which were arguably abandoned because they were not raised in the Superior Court were nonetheless reviewable because the failure to raise the claims was alleged to be due to the ineffective assistance of appellate counsel.

The petitioners ask this Court to strike down what they view as a pernicious holding in Chaussard through this case. Such a request is inappropriate under this Court's principle of carefully choosing the cases to be given plenary review. Chaussard would likely present a very interesting



opportunity to engage in an analysis of whether and when procedural defaults will defeat exhaustion, all in the context of an interesting factual and procedural record. Despite the citations to Chaussard by the panel in this case, and the fact that this case and Chaussard both involve pro se petitions for discretionary review, this record does not give rise to the question of whether disqualifying procedural defaults in the state record will defeat exhaustion. The answer to that question must await the presentation of the appropriate record to this Court.

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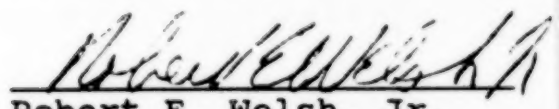
## CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition

for a writ of certiorari should be denied.

Respectfully submitted,



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No. 87-1602

In The

# Supreme Court of the United States

October Term, 1988

RONALD D. CASTILLE, District Attorney of Philadelphia County; THOMAS FULCOMER, Superintendent, Huntingdon State Correctional Institute; and LEROY ZIMMERMAN, Attorney General of Pennsylvania,

*Petitioners,*

v.

MICHAEL PEOPLES,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONER

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## QUESTIONS PRESENTED

1. Is there compliance with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b) (1982) if the state courts' opportunity to consider and correct an alleged constitutional violation is not a meaningful opportunity within the context of state court practices and procedures?

2. Does a convicted state prisoner's mere token presentation to the highest state court, of a claim which is unreviewable as a matter of state law because of a prior procedural default, comply with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b)?

3. Does a convicted state prisoner's mere token presentation to the highest state court, of an ineffectiveness or other claim which is unreviewable as a matter of state law because of the absence of a substantiating record, comply with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b)?

4. Does a convicted state prisoner's *pro se* presentation of claims to the highest state court comply with the comity-based exhaustion requirement of 28 U.S.C. § 2254(b) where the state practice of granting a prisoner's alternative request for counsel precludes substantive consideration of those claims?

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TABLE OF AUTHORITIES—Continued



No. 87-1602

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v.

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## BRIEF FOR PETITIONER

## OPINIONS AND JUDGMENTS BELOW

The unreported December 31, 1987 panel opinion of the Court of Appeals for the Third Circuit is set forth in the Joint Appendix at pages 90-97. The Third Circuit's January 25, 1988 denial of rehearing is found at page 98 of the Joint Appendix. The April 1, 1987 Report and Recommendation of the United States Magistrate is set forth in the Joint Appendix at pages 77-83. The April 17, 1987 and April 21, 1987 Orders of the United States Dis-

trict Court for the Eastern District of Pennsylvania, are set forth at pages 84-85 and 89 of the Joint Appendix.

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## STATEMENT OF JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 2254, respondent, Michael Peoples, brought this habeas corpus action in the Eastern District of Pennsylvania. By orders dated April 17, 1987 and April 21, 1987, the Eastern District dismissed the habeas corpus petition for failure to exhaust state court remedies. On December 30, 1987, a Third Circuit panel entered a judgment and opinion reversing these orders and remanding for a hearing on the merits of the habeas corpus petition. Petitioner's request for rehearing by the Court of Appeals *en banc* was denied on January 25, 1988. *Certiorari* was timely sought on March 25, 1988, and granted on May 16, 1988.

The jurisdiction of this Court to review the judgment of the Third Circuit rests on 28 U.S.C. § 1254(1) (1982).

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## STATUTE INVOLVED

28 U.S.C. § 2254(b) and (c), provide:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.



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## STATEMENT OF THE CASE

Respondent, a state court prisoner, is now incarcerated, serving a sentence of not less than fifteen (15) nor more than thirty (30) years as a consequence of his participation in a particularly brutal crime. During the early morning hours of August 2, 1980, respondent and two others abducted Robert Gallagher from a center city Philadelphia street and took him to the seventh floor hallway of the nearby Touraine Apartments. There they robbed and assaulted him and set him on fire (N.T. Triai, 114-115, 117-119, 120, 163-164, 170).

Because he was intoxicated, Mr. Gallagher did not recall the details of the incident. He remembered only that, at some point, he was hit in the head, kicked and set on fire (N.T. Trial, 115-116, 118-119). When he was found by a security guard in the apartment building's seventh floor hallway, he was unconscious and on fire (N.T. Trial, 153-154, 170, 191-192). The extent of his injuries required that he be immediately transported to the hospital; after his arrival it was established that his watch and wallet were missing (N.T. Trial, 197, 120).

While hospitalized, Mr. Gallagher was treated for extensive pancreatic and bladder injuries; in addition, the severity of the burns on his back necessitated a skin graft (N.T. Trial, 121). His hospitalization lasted twenty-one (21) days; approximately nine (9) of those days was spent in the hospital's intensive care unit (N.T. Trial, 121-122).

Respondent was arrested for his complicity in this crime approximately three (3) hours after its occurrence when he was found by police to be in possession of Mr. Gallagher's wallet (N.T. Trial, 198, 201-204, 233-234). Following his arrest, and after waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), respondent told police that he had found Mr. Gallagher's wallet in the street and denied being inside the Touraine Apartments on the night of the incident (N.T. Suppression, 103-107; N.T. Trial, 278, 283, 284).

Represented by court-appointed counsel, respondent sought unsuccessfully pre-trial to suppress (1) his statement, (2) physical evidence (Mr. Gallagher's wallet), and (3) in-court identifications and out-of-court photograhpic identifications made by the desk clerk and the security guard who were in the apartment building when the crime occurred (N.T. Suppression, 3, 170-171, 174, 177-178). The case then immediately proceeded to trial before a jury, presided over by the Honorable James T. McDermott, now a Pennsylvania Supreme Court Justice.

At trial, Mr. Gallagher was unable to identify respondent (N.T. Trial, 147). He recalled only that one of the three abductors and attackers had a high "bush;" this hairstyle was similar to respondent's hairstyle at the time of his arrest (N.T. Trial, 118-119, 219-220; N.T. Suppression, 177). Other witnesses positively established respondent's presence in the apartment building when the assault occurred. Both Mr. Wright, the desk clerk, and Mr. Hassano, the guard who found Mr. Gallagher, testified that respondent left the apartment building shortly before Mr. Gallagher's discovery in the seventh floor hallway (N.T. Trial, 151-154, 167-170). Mr. Hassano also identified respondent as one of the people who entered the apartment building earlier with Mr. Gallagher (N.T. Trial, 161-162, 163-164). Respondent's possession of Mr. Gallagher's wallet some three hours after the attack was also shown (N.T. Trial, 198, 201-203). Additionally, the government established that a lineup to determine if Mr. Wright and Mr. Hassano could identify respondent, which respondent had requested and which had been scheduled to take place before the preliminary hearing, was cancelled because respondent's hairstyle was substantially different on the lineup date despite a court order prohibiting a pre-lineup change of appearance (N.T. Trial, 218-221, 229-230).



By way of defense, respondent intended initially to rely on his exculpatory statement and thereby to establish his allegedly innocent possession of his victim's wallet. He sought to so proceed because the trial court had determined that his testimony could be impeached and his credibility challenged by the admission into evidence, on rebuttal, of proof of some of his prior convictions for crimes in the nature of *crimen falsi* (N.T. Trial, 259).[1]

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[1]Pennsylvania statutory authority (42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982), previously Pa. Stat. Ann. tit. 19, § 711

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This attempt to place self-serving, unsworn evidence before the jury, about which respondent could not be cross-examined, was appropriately rejected (N.T. Trial, 259).[2] Respondent then chose to testify on his own behalf.

On direct examination respondent admitted to the crimes which the trial judge had ruled admissible on rebuttal for impeachment purposes (N.T. Trial, 269). He also disavowed the veracity of his previously offered post-arrest statement and said that he entered the Touraine Apartments with Gallagher to culminate a drug

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(Purdon 1964)) generally prohibits the cross-examination of testifying defendants about their prior crimes. Case law, however, permits some prior convictions for crimes involving dishonesty or false statement to be introduced into evidece on rebuttal for the limited purpose of attacking a testifying defendant's credibility . *See Commonwealth v. Bighum*, 452 Pa. 554, 562-563, 566, 307 A.2d 255, 260, 262-263 (1973). At the time of respondent's trial, the admissibility of such crimes, on rebuttal for impeachment purposes, was determined by applying the balancing test first set forth in *Commonwealth v. Bighum*, 452 Pa. at 567, 307 A.2d at 263, and later explained in *Commonwealth v. Roots*, 482 Pa. 33, 39-41, 393 A.2d 364, 365-368 (1978). (In 1987 the Pennsylvania Supreme Court modified those decisions and adopted a rule similar to Federal Rule of Evidence 609. *See Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987).) Applying *Bighum* and *Roots*, Judge, now Justice, McDermott determined during respondent's trial that only the robberies committed by him in 1973 and 1974, and the retail theft committed by him in 1978, were admissible for purposes of impeachment (N.T. Trial, 241-248).

[2]*See Commonwealth v. Murphy*, 493 Pa. 35, 43, 425 A.2d 352, 356 (1981) (where defendant "seeks at trial to introduce his own statements made at the time of arrest to support his version of the facts such testimony is clearly offensive to the hearsay rule").



deal, gave Gallagher money to obtain drugs for him, and waited for Gallagher on the building's fifth floor holding his wallet as collateral. When Gallagher did not return after twenty minutes, he and the man with whom he was waiting decided to leave and return to the restaurant where he had earlier met Gallagher and was later stopped by the police (N.T. Trial, 270-275).

While cross-examining respondent, the prosecutor briefly noted the robbery and shoplifting convictions previously referenced by respondent, without discussing their underlying facts (N.T. Trial, 282). The prosecutor also extensively covered respondent's earlier, very substantially different, statement to the police, as well as respondent's prior adoption of that statement (N.T. Trial, 283-290).

On January 16, 1981, the jury convicted respondent of arson, robbery and aggravated assault. Respondent's bail was revoked pending disposition of post-verdict motions (N.T. Trial, 407-408, 410).

Post-trial, respondent continued to be represented by the same court-appointed attorney, who filed post-verdict motions raising some but not all of his five subsequent habeas claims (J.A. 11-13). These motions were heard and denied by the court on April 28, 1981 (N.T. Post-verdict Motions, 29).[3] Respondent was then sentenced to

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[3]Under Pennsylvania law, post-verdict motions are the initial stage of the appellate process. Any claim omitted from written post-verdict motions is waived for subsequent appellate consideration. *See* Pa. R. Crim. P. 1123(a) (only issues contained in written post-verdict motions may be heard or argued); Pa. R. App. P. 302(a) (issues not raised in lower court may not be raised for the first time on appeal); and *Commonwealth v. Mitchell*, 464 Pa. 117, 121-126, 346 A.2d 48, 50-53 (1975) (announcing strict enforcement of appellate waiver provisions).

serve ten (10) to twenty (20) years for the arson, a consecutive five (5) to ten (10) years for the robbery, and a concurrent ten (10) year probationary sentence for the aggravated assault (N.T. Post Verdict Motions, 37-38).

Represented by new counsel, respondent appealed to the Pennsylvania Superior Court, the Commonwealth's intermediate appellate court. That court affirmed the judgment of sentence in an unreported Memorandum Opinion. *Commonwealth v. Peoples,* 319 Pa. Super. 621, 466 A.2d 720 (1983) (J.A. 44-49). Respondent next filed with the Pennsylvania Supreme Court a *pro se* pleading entitled "Petition for Allowance to File Appeal to Review Errors of Superior Court With Appointment of New Counsel" (J.A. 49-59).[4] Besides purporting to raise a number of legal claims, this petition requested the appointment of counsel (J.A. 49, 58-59). The Commonwealth's response noted the request for counsel, urged a hearing to determine respondent's entitlement to court-appointed counsel, and advised the Supreme Court that a substantive response would not be offered unless requested by the Court (J.A. 60). No such answer was ever requested; rather, the Supreme Court ordered that counsel be provided and directed new counsel to seek discretionary review within thirty (30) days after appointment (J.A. 61). A counselled Petition for Allowance of Appeal (discretionary review) was subsequently filed on respondent's behalf

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[4]Respondent was entitled to appellate review, as of right, only by the Superior Court. Supreme Court jurisdiction over his case was entirely discretionary. *See* 42 Pa. Cons. Stat. Ann. §§ 722, 724, 742, 761 (Purdon 1981).



(J.A. 62-68). It was denied by the Supreme Court, without explanation, on November 4, 1985 (J.A. 69).[5]

Because the Supreme Court's ruling was not a ruling on the merits, respondent's claims were not thereby rendered "finally litigated" so as to bar them from state post-conviction review.[6] Rather, the court's denial of discretionary review opened the way for respondent to seek collateral review of his conviction pursuant to state statute.[7] Respondent chose, however, to proceed under 28

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[5]Pa. R. App. P. 1114, Considerations Governing Allowance of Appeal, which is patterned after U.S. Sup. Ct. Rule 17, Considerations governing review on certiorari, states that such review "is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor." Similarly, as with *certiorari* denials by this Court, reasons for the denial of discretionary review are rarely given by the Pennsylvania Supreme Court.

[6]*See Commonwealth v. Tarver,* 493 Pa. 320, 331, 426 A.2d 569, 575 (1981) (Supreme Court denial of discretionary review is not a ruling on the merits which would render a claim "finally litigated" (and therefore non-reviewable) pursuant to 42 Pa. Cons. Stat. Ann. § 9544(a) (Purdon 1982) (repealed 1988)).

[7]Pennsylvania's collateral review statute, which was then the Post Conviction Hearing Act, is now the Post Conviction Relief Act, Act No. 1988-47, 1988 Pa. Legis. Serv. 229 (Purdon) (to be codified at 42 Pa. Cons. Stat. Ann. §§ 9541-9546). Like the prior statute, the now applicable statute provides respondent with an available state court avenue of relief since his claims of error are within the act's purview and are not otherwise barred. Claims which may be asserted under the present act include the ineffective assistance of counsel which "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place" (§ 9543(A)(2)(II)), and any violation of the constitution, law or treaties of the United States "which would require the granting of federal habeas corpus relief to a state prisoner" (§ 9543(A)(2)(V)). Even if previously waived (procedurally defaulted) in the state court proceedings, claims are cognizable under the Post Con-

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U.S.C. § 2254. In his federal habeas corpus petition filed pursuant thereto, he claimed entitlement to relief on five (5) different grounds.

The United States District Court for the Eastern District of Pennsylvania dismissed respondent's petition because of non-exhaustion resulting from state court appellate defaults and the availability of a state court avenue of review (J.A. 77-83, 84-85, 89).[8] This order comported with Pennsylvania's strict waiver (procedural default) and other procedural rules, and with the procedural history of the five claims asserted by respondent in his federal habeas corpus petition.

Under Pennsylvania law, claims are reviewable only if they are timely and fairly raised at all prior stages of the proceedings. Thus, for a claim to be considered by the Pennsylvania Supreme Court on discretionary review, it must have been raised (1) before or during trial, (2) in written post-verdict motions, (3) in the Superior Court, and (4) in the petition for discretionary review (Petition for Allowance of Appeal). *See Commonwealth v. Drake*,

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viction Relief Act if they "resulted in the conviction or affirmance of sentence of an innocent individual" or if the state court waiver "does not constitute a state procedural default barring federal habeas corpus relief" (§ 9543(A)(3)), so long as they are not "previously litigated" pursuant to § 9544(A)(3), the substantial equivalent of "finally litigated" pursuant to prior § 9544 (a).

[8]The District Court's dismissal orders (J.A. 84-85, 89) predated the April 27, 1987 Third Circuit decision in *Chaussard v. Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S. Ct. 139 (1987), upon which the Third Circuit subsequently relied in deciding this case.



489 Pa. 541, 414 A.2d 1023 (1980).[9] Where a claim is not properly preserved for review but new counsel assumes representation of a defendant, new counsel can resuscitate any previously waived (defaulted) claim by alleging cause to overcome the default, *i.e.*, the ineffective assistance of prior counsel. The issue of ineffective assistance must be raised at the first opportunity when an accused is represented by new counsel, however, or there is a waiver (procedural default) as a matter of state law.[10] Further, a claim of ineffective assistance of counsel will not be decided on direct appeal unless clear and irrefutable proof of the issue appears on the face of the record. *See Commonwealth v. Cook*, 230 Pa. Super. 283, 284, 326 A.2d 461 (1974). If the record is inadequate, an appellate court may remand the case for an evidentiary hearing, *see Commonwealth v. Davis*, 499 Pa. 282, 283-284, 453 A.2d 309, 310 (1982), or await the results of a post-conviction proceeding, *see Commonwealth v. Cook*, 230 Pa. Super. at 283, 326 A.2d at 461.

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[9]This rule is admitting of no exception and applies equally to claims abandoned at the intermediate appellate court level. *See Commonwealth v. Piper*, 458 Pa. 307, n.5 at 310, 328 A.2d 845, n.5 at 847 (1974) (claim raised in trial or sentencing court but abandoned in the intermediate appellate court is waived for Supreme Court review); *accord Sheppard v. Old Heritage Mut. Ins. Co.*, 492 Pa. 581, 591, 425 A.2d 304, 309 (1980) (failure to pursue issue on appeal is just as effective a waiver as failure to initially raise it).

[10]*See Commonwealth v. Webster*, 490 Pa. 322, 325, 416 A.2d 491, 492 (1980) (exception to rule that issues not raised in post-verdict motions will not be considered on appeal is when ineffectiveness of prior counsel is raised; but in such a case, ineffectiveness must be raised at earliest stage in proceedings at which counsel whose representation is being challenged no longer represents the accused); *accord Commonwealth v. Hubbard*, 472 Pa. 259, n.6 at 276-277, 372 A.2d 687, n.6 at 695 (1977).

The foregoing principles are pertinent in determining whether all of respondent's five habeas claims could be reviewed in the state appellate courts, and, thus, whether the state courts had a fair opportunity to consider those claims. *See Picard v. Connor,* 404 U.S. 270, 276-277 (1971).

*Claim 1—Due Process and State Statutory Violations Based on the Prosecutor's Cross-Examination of Respondent about Prior Robbery and Theft Convictions in the Face of 42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982)* (J.A. 73): To the extent that this meritless state law claim was previously presented, it was presented in violation of state appellate procedures.[11] The challenged cross-examination was not objected to at trial (N.T. Trial, 269). Neither was it raised in post-verdict motions or before the Superior Court (*see* J.A. 11-13, 26-43).[12] It was first alluded to in respondent's *pro se* Supreme Court petition. There, respondent alleged only that trial counsel was ineffective for failing to object to the cross-examination (J.A. 51-52). This claim could not then be considered for

[11]See, with respect to the merits of this claim, n.1 at pages 5-6, and *Commonwealth v. Garnett,* 204 Pa. Super. 113, 117-118, 203 A.2d 328, 330 (1964) (cross-examination of defendant about prior crimes brought out on direct examination, in technical violation of Pa. Stat. Ann. tit. 19, § 711 (Purdon 1964) [recodified as 42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982)] not error where "ensuing questions by the district attorney were in natural development of the facts already in evidence and without design to prejudice the defendant").

[12]On post-verdict motions, and again in the Superior Court, it was alleged only that the trial court abused its discretion in allowing the use of two prior robbery convictions for impeachment purposes (J.A. 12, 27, 28, 34-37). Such a claim is substantially different than the assertion of a § 5918 violation. *See* n.1, at pages 5-6.



three separate reasons. First, respondent failed properly to layer his claim and to allege appellate court counsel's ineffectiveness for failing to challenge trial counsel's stewardship. *See* text preceding at page 11 and n.10 at page 11. Second, it could not be considered because of the standard state court practice of appointing appellate counsel on request. Finally, it could not be considered, as a matter of state practice and procedure, because of the absence of a substantiating record. *See* text preceding at page 11, *Commonwealth v. Davis,* 499 Pa. 282, 283-284, 453 A.2d 309, 310 (1982), and *Commonwealth v. Cook,* 230 Pa. Super. 283, 284, 326 A.2d 461 (1974). In the subsequent counselled *allocatur* petition, respondent did allege both trial and appellate counsel's ineffectiveness for failing to preserve this claim. Even then, however, it could not be considered because of the lack of a substantiating record.

*Claim 2—Due Process and Equal Protection Violations Based on the Denial of Respondent's State Law Right to a Bench Trial* (J.A. 74): This claim also was not presented in a specific and orderly fashion in the state courts. Although raised as a state law claim at trial (N.T. Trial, 102, 105) and again at post-verdict motions (J.A. 12), it was omitted in respondent's Superior Court appeal (*see* J. A. 26-43). In the *pro se* Supreme Court petition, it was asserted by respondant (J.A. 53-54). Respondent, however, although he raised other ineffectiveness claims (J.A. 51-52), did not properly raise and preserve this claim by alleging Superior Court counsel's failure to raise and preserve it (J.A. 53-54). *See Commonwealth v. Piper,* 458 Pa. 307, 328 A.2d 845 (1974). Further, given the state procedural scheme with respect to the appointment of counsel,

the Supreme Court did not and could not then consider the merits of any allegations of error in this petition (J.A. 61). This allegation was omitted from the subsequent counselled *allocatur* petition (*see* J.A. 62-68).

*Claim 3—Due Process Violation arising from the Admission of Suggestive and Tainted Identification Evidence* (J.A. 74): This claim was raised in the trial court by the filing and litigation of a motion to suppress identification evidence (N.T. Suppression, 3, 177-178). Post-verdict it was alleged that suppression should have been granted (J.A. 12), and in the Superior Court respondent challenged both the out-of-court and in-court identifications (J.A. 26-27, 29-34). Respondent also raised these arguments in his *pro se* Supreme Court petition which was not substantively considered by the court as a matter of orderly state procedure (J.A. 54-55). The subsequent counselled *allocatur* petition omitted any challenge to identification evidence (*see* J.A. 62-68).

*Claim 4—Deprivation of the Sixth Amendment Right to Competent Counsel Based on Trial Counsel's Failure to Challenge Respondent's Second Stopping and the Related Seizure of Physical Evidence* (J.A. 74): As this claim involved an allegation of ineffective assistance of trial counsel, state law required its assertion at the first available opportunity—here, when new counsel assumed representation at the Superior Court level. *See Commonwealth v. Webster,* 490 Pa. 322, 325, 416 A.2d 491, 492 (1980) and n.10 at page 11. It was not then asserted (*see* J.A. 26-43). Neither was it raised in the *pro se* Supreme Court petition (*see* J.A. 49-59). The later counselled *allocatur* petition did allege Superior Court counsel's ineffectiveness for not challenging the correctness of the trial court's physical



evidence suppression ruling (J.A. 67). This, however, is a different argument than respondent's habeas corpus allegation that trial counsel ineffectively failed altogether to seek such suppression.

*Claim 5—Deprivation of the Sixth Amendment Right to Competent Counsel Based on Trial Counsel's Failure to Challenge Evidence of Respondent's Contempt for Violating the Lineup/No Change of Appearance Court Order* (J.A. 74-75): This ineffectiveness claim also was not raised at the first available opportunity in the Superior Court (see J.A. 26-43). It was subsequently raised in the *pro se* petition (J.A. 55-56). The claim, however, was not then substantively considered by the Supreme Court which chose, as a matter of state practice and procedure, to appoint counsel rather than consider any of the petition's allegations (*see* J.A. 60-61). Nor could the ineffectiveness claim then have been considered since it lacked a substantiating record and had not been raised at the earliest possible opportunity as required by law. *See Commonwealth v. Davis,* 499 Pa. 282, 453 A.2d 309 (1982); *Commonwealth v. Webster,* 490 Pa. 322, 416 A.2d 491 (1980); *Commonwealth v. Cook,* 230 Pa. Super. 283, 326 A.2d 461 (1974), text at page 11 and n.10 at page 11. Finally, this ineffectiveness claim was not raised in the subsequent counselled *allocatur* petition (*see* J.A. 62-68).

Thus, none of respondent's claims of error was presented to the Pennsylvania Supreme Court in a procedurally correct manner which would permit their substantive consideration as a matter of state court law and practice. Hence, as the District Court concluded, the comity-based exhaustion requirement of § 2254(b) was not met. The Third Circuit Court of Appeals subsequently concluded

otherwise and reversed based on *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir.), *cert. denied,* 108 S. Ct. 139 (1987) (J.A. 97).[13] That court so acted merely because each of the claims was somehow presented to the Supreme Court. Its action was without regard for whether an inadequate record or controlling state court procedures effectively precluded that court's substantive consideration of respondent's claims (*see* J.A. 90-97). It also declined to acknowledge that the Supreme Court could not have substantively considered the *pro se* pleading under the existing state scheme.[14] A timely petition for writ of *certiorari* was thereafter filed with this Court and granted on May 16, 1988.

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## SUMMARY OF ARGUMENT

For federal habeas corpus exhaustion purposes, the Third Circuit employs a "mere presentation" rule. This rule liberally grants habeas review to state prisoners who

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[13]In *Chaussard,* two of the habeas claims presented to the Pennsylvania Supreme Court were abandoned at the intermediate appellate court level and, therefore, waived. *See Commonwealth v. Piper,* 458 Pa. 307, 328 A.2d 845 (1974) and n.9 at page 11. Misapplying this Court's opinion in *Smith v. Digmon,* 434 U.S. 332 (1978), the Third Circuit declined to attach habeas corpus significance to the state appellate court procedural default, concluding that the mere presentation of claims to a state's highest court, however improper, will satisfy the comity-based exhaustion requirement.

[14]The three judge panel noted that its ruling "may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement," but felt bound by the Third Circuit's earlier ruling in *Chaussard* (J.A. 95).



presented their claims in any fashion to the highest state court, regardless of whether they followed state-mandated procedures which are prerequisites for review on the merits. Such an ill-based approach deprives state courts of a fair opportunity to consider and correct all alleged violations, and conflicts directly with this Court's prior decisions and with the decisions of every other circuit addressing the issue. It, therefore, should be rejected.

Respondent here presented several claims to the Pennsylvania Supreme Court, each of which was unreviewable because of one or more violations of state procedure or practice. Most claims were not raised at every stage of the appellate process and were, therefore, barred by procedural defaults. Some claims were unreviewable because defendant failed to follow state procedures for obtaining a substantiating evidentiary record. Finally, some claims were raised in a *pro se* filing which alternatively requested counsel. Under its standard practice, the state court treated this *pro se* filing only as a request for counsel.

Ignoring all of these violations, the Third Circuit found that respondent's token presentation of his claims satisfied the comity-based exhaustion requirement of 28 U.S.C. § 2254(b). It did so although there was no genuine possibility, given state practice and procedure, that the state supreme court could have reviewed the merits of the claims.

The Third Circuit's rule endorses and rewards state procedural violations, breeds disrespect for state procedures, and violates fundamental principles of comity. Unless repudiated by this Court, it will force already overburdened federal courts to assume the fact-finding role

Congress gave to the state courts, and to expend vast, additional resources to provide the evidentiary hearings and factual findings which state prisoners chose not to obtain in state court. The federal courts should not be so burdened and state prisoners should not be permitted to engage in such forum-shopping.

This Court should explicitly reject the Third Circuit's approach and make clear that deference must be afforded state court practices and procedures in determining whether the comity-based exhaustion requirement of 28 U.S.C. § 2254(b) has been met.

—o—

## ARGUMENT

### DEFERENCE MUST BE AFFORDED STATE COURT PRACTICES AND PROCEDURES IN DETERMINING WHETHER THE EXHAUSTION REQUIREMENTS OF 28 U.S.C. § 2254(b) HAVE BEEN MET.

A convicted state prisoner seeking federal habeas corpus relief must either exhaust state court remedies, or demonstrate the absence of an available state court corrective process or the existence of circumstances rendering that process ineffective to protect his rights. *See* 28 U.S.C. § 2254(b). The exhaustion rule is satisfied only when the state courts have had a fair opportunity to consider and correct all alleged violations, and the substance of each federal claim was presented to the state courts in a substantially equivalent form. *See Picard v. Connor*, 404 U.S. 270, 276-278 (1971). Further, unless such compliance is established with regard to all claims asserted,



the petition must be dismissed. *See Rose v. Lundy*, 455 U.S. 509 (1982).[15]

Conflicts now exist among and within the circuits with respect to what constitutes, for exhaustion purposes, a full, fair and genuine opportunity for the state courts to review the merits of federally-based claims. This case permits the resolution of those conflicts. In so doing, this Court should make clear that the federal courts must give due regard for state court practices and procedures and insure that the state courts' opportunity for review is a meaningful one.

Significant to the resolution of the existing conflicts are this Court's prior rulings requiring state prisoners to

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[15]Although now codified, the exhaustion rule, which is designed principally "to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings," has been enforced by this Court since its decision in *Ex Parte Royall*, 117 U.S. 241 (1886). *See Rose v. Lundy*, 455 U.S. at 516. It reflects the long-standing policy of comity between federal and state courts, *see Ex Parte Hawk*, 321 U.S. 114, 117 (1944), and allows the state courts to "become increasingly familiar with and hospitable toward federal constitutional issues." *Rose v. Lundy*, 455 U.S. at 520. As such, it is "unseemly" not to give state courts the first opportunity to consider a defendant's claims. *See Picard v. Connor*, 404 U.S. 270, 276 (1971).

The exhaustion requirement also assures that claims presented to federal habeas courts will be "accompanied by a complete factual record . . . ." *Rose v. Lundy*, 455 U.S. at 520. Such a result gives real meaning to the comity-based presumption that state court findings of fact are correct and binding on the federal habeas court. *See Sumner v. Mata*, 449 U.S. 539 (1981); 28 U.S.C. § 2254(d). This presumption of correctness would be of no use if there were no exhaustion requirement to insure that state courts had an opportunity to make findings of fact before federal habeas review. Subsumed in the principle of comity is a concern with the orderly administration of criminal justice. *See Francis v. Henderson*, 425 U.S. 536, 540 (1976).

use a state's normal channels of review. Bypassing those channels, by use of plainly incorrect state procedures, or by resort to narrow writs limited to the exercise of extraordinary review, has been held to preclude the opportunity for meaningful state review. *See Pitchess v. Davis*, 421 U.S. 482 (1975); *Ex Parte Hawk*, 321 U.S. 114 (1944).

The Third Circuit has violated the spirit and intent of this Court's prior holdings. Resort to a state's normal channels of review is only nominally required by its decisions. Under the circuit's "mere presentation" rule, which was applied instantly, federal habeas review is given to federally-based claims which were raised in the state supreme court regardless of whether state-mandated appellate or other procedures, which were prerequisites for state court review, were then followed.[16] The Third Circuit

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[16]In *Chaussard v. Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S. Ct. 139 (1987), two federal claims, presented in a petition for allowance of appeal to the Pennsylvania Supreme Court, had been abandoned at the intermediate court level, in violation of Pennsylvania's strict waiver (procedural default) law. *See* n.9 at page 11. Attaching no significance at all to the state appellate default, the comity-based exhaustion rule was held satisfied. Wrongly relying on this Court's decision in *Smith v. Digmon*, 434 U.S. 332 (1978), a case in which claims were raised in a proper way in the state system, the Third Circuit treated its decision in *Chaussard* as a simple application of the rule that discretionary review has the same exhaustion consequences as an appeal as of right. The equivalence of the two kinds of appeals, for exhaustion purposes, is not in dispute. What is objected to is the Third Circuit's conclusion that a state's adherence to its reasonable procedures is a mere act of discretion, entitled to no federal deference. One unfortunate consequence is that courts in the Third Circuit have found state remedies "exhausted" even where a prisoner's petition to the Pennsylvania Supreme Court plainly violated state procedure because it was not timely filed and contained waived (defaulted) claims. *See, e.g., Ross v. Fulcomer*, 610 F. Supp. 560 (E.D. Pa. 1985); *accord, Moore v. Fulcomer*, 609 F. Supp. 171 (E.D. Pa. 1985).



adheres to this rigid position even where the state provides a collateral remedy through which a state prisoner may seek to correct the procedural irregularities which arose on direct appeal, and thus obtain full state review of his claims.[17]

Here, three of Pennsylvania's procedures and practices barred the state's high court from reviewing the merits of respondent's claims. These were uniformly ignored by the Third Circuit.

First, when claims 1, 2, 4 and 5 were presented to the highest state appellate court they could not be substan-

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[17]The question of whether a state prisoner has sufficiently complied with state procedures in raising his claims, for exhaustion purposes, is distinct from the procedural default and waiver issues considered by this Court in *Fay v. Noia*, 372 U.S. 391 (1963) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). *See Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *Wainwright v. Sykes*, 433 U.S. at 78-81 (1977) (distinguishing the two principles). The *Wainwright* cause and prejudice rule applies when the state has had a full opportunity to address the question of whether to apply its waiver law. Where, for example, a claim is unobjected to at trial but raised on appeal, the state appellate courts are confronted directly with the question of whether to apply the state's contemporaneous objection rule and preclude review. If this occurs, the federal habeas court is confronted with an independent state ground—a procedural default—which will also preclude federal review unless the petitioner can demonstrate cause for and prejudice from his procedural default. This and similar situations presuppose that no further state remedy is available, and, thus, that a petitioner's claims are exhausted within the meaning of § 2254. By way of contrast, where, as here, a state court procedural default precludes a finding of exhaustion, state review is not barred by an independent state ground, and collateral review remains available to the state prisoner. The possibility remains that an appellate waiver will be excused, allowing state, and, subsequently, federal, review of defaulted claims. Similarly, belatedly-raised claims, alleging ineffectiveness or after-discovered evidence issues which lack an adequate record, may still be reviewed by the state courts.

tively considered because their earlier omission at one or more stages of the litigation made them unreviewable as a matter of state law under Pennsylvania's waiver (procedural default) rule. That rule, viewed by Pennsylvania courts as serving vital judicial interests, is strictly enforced. *See Commonwealth v. Drake,* 489 Pa. 541, 414 A.2d 1023 (1980); *Commonwealth v. Mitchell,* 464 Pa. 117, 121-126, 346 A.2d 48, 50-53 (1975). Nonetheless, the Third Circuit ruled that state remedies had been exhausted with regard to those claims, making adherence to this integral part of Pennsylvania's waiver scheme unnecessary for federal habeas applicants (J.A. 96).

Respondent also began, but did not complete, the Pennsylvania procedure provided to review ineffective assistance of counsel claims raised for the first time on appeal. Although some claims of ineffective assistance of trial counsel were raised in the Pennsylvania Superior Court, no ineffectiveness claim set forth in the subsequent federal habeas petition was then asserted. Thus, as to the latter habeas corpus claims, respondent violated Pennsylvania's requirement that ineffectiveness claims be raised at the first opportunity after new counsel enters the case. *See* n.10 at page 11.

Even had these ineffectiveness claims been raised, they were then unreviewable and would have been treated like the other ineffectiveness claims which the Superior Court found could not be resolved based on the existing record (*see* J.A. 47-48). Similarly, the challenges to the ineffectiveness of trial and appellate counsel, which were finally raised for the first time in the Pennsylvania Supreme Court (claims 1, 2, 4 and 5), could not then be decided. That court could not rule upon such claims



without the benefit of an evidentiary hearing and/or the findings and reasoning of the lower courts. In Pennsylvania, where ineffectiveness claims are raised for the first time in the appellate courts and lack an adequate factual record, remand or resort to the state's collateral remedy is required so that the record can be prepared. Text at page 11. The Third Circuit ruled, nonetheless, that resort to the state's collateral remedy was unnecessary. Although it foreclosed the state from holding an evidentiary hearing in a court of record or making factual and credibility findings, the Third Circuit concluded that the state had received a fair opportunity to review the ineffectiveness claims (J.A. 96-97).

Finally, the Third Circuit concluded that all claims raised in respondent's *pro se* Supreme Court proceeding, which included a request for counsel, were exhausted because, as a result of that pleading, there existed an opportunity for their consideration (J.A. 94-95). This also did not show sufficient deference to state court practice.

Pennsylvania has made the "valid choice" of providing prisoners with counsel, beyond federal constitutional requirements. *See Pennsylvania v. Finley,* 107 S. Ct. 1990 (1987) (although not constitutionally required, Pennsylvania provides counsel to prisoners on collateral review). Pursuant to that practice, the state supreme court customarily appoints counsel on applications for discretionary review, where, as here, counsel is requested (J.A. 61). Because clients are bound by the decisions of counsel, state supreme court review in the present case was limited, by the grant of respondent's request for counsel, to the issues subsequently raised in the counselled petition, *see Murray v. Carrier,* 477 U.S. 478 (1986), and the state supreme

court reasonably did not review the claims presented in the uncounselled petition. The Third Circuit ruled, nevertheless, that the state's "choice," designed to facilitate the presentation of respondent's appeal issues, would be accorded no federal deference (J.A. 95). For exhaustion purposes, the state court was charged with having reviewed the merits of the claims in the *pro se* petition, despite the state practice directly to the contrary.[18]

The Third Circuit is in conflict with every other circuit addressing this issue, both in policy and result. The Seventh Circuit unequivocally rejected the Third Circuit approach as violative of fundamental comity concerns, stating:

> [T]he Indiana Supreme Court presumably could have chosen to ignore its procedural rule and passed on the merits of the constitutional issue. It cannot be said, however, that the court should be *required* to ignore its own procedures. "If a petitioner wishes to exhaust his claims, he is expected not only to use the normal avenues of relief but also to present his claims before the courts in a procedurally proper manner according to the rules of the state courts." [citation omitted] . . . The exhaustion rule is a rule of comity which recognizes that, while it is necessary for the federal courts to be available to protect the rights of state prisoners, it is also necessary that state courts be permitted to function without undue interference.

*Wallace v. Duckworth*, 778 F.2d 1215, 1223 (7th Cir. 1985) (emphasis added). Confronted with an identical issue, the

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[18]The Third Circuit panel in this case, while feeling bound by *Chaussard*, did acknowledge that, because of the state practice with respect to the appointment of counsel at this stage of appeal, "once a counseled petition had been filed, it would have been improper to consider the claims raised in the *pro se* petition but not the counseled one" (J.A. 95).



Ninth Circuit similarly concluded that it "need not find that the Oregon Supreme Court lacked jurisdiction to hear the claim," but only that the failure to comply with state procedures for the presentation of claims was not a "fair" opportunity for review, for federal habeas purposes. *Kellotat v. Cupp*, 719 F.2d 1027, 1031 (9th Cir. 1983).

Employing a similar rationale, a number of circuits have expressly held that presentation of claims in violation of state appellate waiver rules, similar to the violations in the present case, do not provide a fair opportunity for state review. *See Dickerson v. Walsh*, 750 F.2d 150 (1st Cir. 1984); *Dupuy v. Butler*, 837 F.2d 699 (5th Cir. 1988); *Wallace v. Duckworth*, 778 F.2d at 1223; *Diamond v. Wyrick*, 757 F.2d 192 (8th Cir. 1985); *McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986); *Kellotat v. Cupp*, 719 F.2d at 1031. *See, generally, Klein v. Harris*, 667 F.2d 274 (2d Cir. 1981).

Contrary to the Third Circuit, other circuits have also found that a meaningful opportunity for state review is not provided where various types of claims, because they are raised for the first time on appeal, lack an adequate factual record for decision.[19] *See Cruz-Sanchez v. Rivera Cordero*, 728 F.2d 1531 (1st Cir. 1981) (claim of newly-discovered evidence, raised on direct appeal, not exhaust-

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[19]An intra-circuit conflict has arisen in the Third Circuit on this point. A 1987 panel decision dismissed a petition, on exhaustion grounds, to allow further factual development in state court of an ineffectiveness claim raised on state direct appeal. *O'Halloran v. Ryan*, 835 F.2d 506 (3d Cir. 1987). While the *O'Halloran* holding accords with the congressional mandate of § 2254(c), application of the exhaustion rule used in *Chaussard* and the present case produces contrary results. Such divergent decisions have engendered confusion and fostered dissimilar applications of the exhaustion doctrine at the district court level.

ed); *Walker v. Dalsheim*, 669 F. Supp. 68 (S.D.N.Y. 1987) and *United States ex rel. LaSalle v. Smith*, 632 F. Supp. 602 (E.D.N.Y. 1986) (both applying *Klein v. Harris* to decline federal review of ineffective assistance of counsel claims raised on direct appeal); *Varnell v. Young*, 839 F.2d 1245 (7th Cir. 1988) (sentencing claim, raised on direct appeal, lacked adequate factual record); *Gornick v. Greer*, 819 F.2d 160 (7th Cir. 1987) (ineffectiveness claims, raised on direct review, lacked adequate record).[20]

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[20]While the Third Circuit's extreme position is uniformly rejected, disagreement among the circuits has arisen over the extent to which there should be deference to a state's procedural scheme. The Fifth Circuit requires compliance with procedures which are not unduly "burdensome," finding that "what constitutes a 'fair opportunity' is not necessarily coextensive with whatever procedural requirements the state may choose to impose." *Carter v. Estelle*, 677 F.2d 427 (5th Cir. 1982), *cert. denied*, 460 U.S. 1056 (1983). Thus, federal review was considered appropriate where state review had been declined because of a violation of a state briefing rule which concerned only a technical aspect of the brief's form. *See Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978). The Sixth Circuit conflicts with the Seventh Circuit with respect to violations of appellate waiver rules where a state also has a fundamental error rule. The Sixth Circuit regards the existence of a fundamental error rule as sufficient to provide an opportunity for meaningful state review, even if the state's highest court expressly declined to review a case under such a rule. *See Wiley v. Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981). The Seventh Circuit holds to the contrary reasoning that where review under a state fundamental error rule is limited to exceptional cases involving gross error, the rule would not provide a basis for meaningful review of a claim not of that magnitude. *See Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir. 1985); *cf. Pitchess v. Davis*, 421 U.S. 482, 488 (1975) ("denial of an application for an extraordinary writ by state appellate courts d[oes] not serve to exhaust state remedies where the denial could not fairly be taken as an adjudication of the merits of claims presented"). The Ninth Circuit accommodates a state's procedural scheme to the extent that its procedures admit of no exceptions. Because Oregon has a

(Continued on following page)



The Third Circuit's illogical rule should be rejected. It is plainly repugnant to the comity principle expressed by this Court over a century ago in *Ex Parte Royall*, 117 U.S. 241 (1886), and consistently adhered to since. The Third Circuit approach relegates the exhaustion requirement to a mere charade and exalts a tokenism previously disclaimed by this Court. *See, e.g., Picard v. Connor*, 404 U.S. 270, 275-276 (1971) ("it is not sufficient merely that the federal habeas applicant has been through the state courts").

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(Continued from previous page)

statutorily-prescribed procedure for review of claims arising on appeal, applicable to all cases, compliance with it is required to exhaust state remedies. *See Kellotat v. Cupp*, 719 F.2d 1027 (9th Cir. 1983); *accord McQuown v. McCartney*, 795 F.2d 807 (9th Cir. 1986) (California Supreme Court rule on petitions for rehearing which prohibits the raising of matters not presented to courts below requires federal court deference); *Lindquist v. Gardner*, 770 F.2d 876 (9th Cir. 1985) (the "clarity" of Idaho's state statutory scheme for post-conviction review requires compliance to satisfy exhaustion requirement).

California's procedure with respect to ineffective assistance of counsel claims, raised via the state's habeas corpus procedure to the appellate courts, is considered "ambiguous" by the Ninth Circuit because it contains a narrow exception. Like New York and Pennsylvania, the California appellate courts generally forego ruling on ineffectiveness claims raised before them for the first time on direct appeal. In rare cases, ineffectiveness claims can and will be resolved on the trial record alone, although a record is usually required to document the basis for counsel's action or inaction. Because of the possibility that the California Supreme Court, in an unusual case, could address the merits of such an ineffectiveness claim, the Ninth Circuit employs the presumption, contrary to state law on the point, that summary denials by the California high court of ineffectiveness claims are on the merits. *See Turner v. Compoy*, 827 F.2d 526 (9th Cir. 1987). Because of the breadth of the Ninth Circuit presumption, and its variance from state practice, the California high court is deprived of an opportunity for meaningful review of the vast majority of ineffectiveness claims raised in this manner. *See Compoy v. Turner*, Petition for Writ of Certiorari, U.S. Supreme Court No. 87-889.

Surely, the reward of federal review ought not to be premised upon the successful violation of a state's procedures, as the Third Circuit rule permits. Such an approach can only encourage disrespect for, and further violations of, the state process.

By its rule, the Third Circuit inevitably encourages forum-shopping as an appellate strategy notwithstanding this Court's express repudiation of the practice. *See Murray v. Carrier,* 477 U.S. 478 (1986). By the simple expedient of raising designated federal claims in a defaulted or otherwise unreviewable form, a state prisoner may deftly deprive the state of its opportunity to correct and review federal claims. Federal review in such circumstances is unaided by state factual and credibility findings or pertinent explication of its laws. Indeed, the federal courts will assume the role of fact-finders, in disregard of the contrary congressional mandate set forth in 28 U.S.C. § 2254(d). *See Sumner v. Mata,* 449 U.S. 539, 549-550 (1981). This Court must not permit fundamental state interests to be defeated by such transparency.

As a practical matter, the Third Circuit approach only increases the caseload of already overburdened federal courts. The winnowing-out of frivolous appeals and issues which inevitably occurs through state litigation would cease. Not only would the federal docket be congested with more cases, but vastly more judicial time and resources would be required to provide the evidentiary hearings and other factual and credibility findings which habeas applicants declined to obtain in the state forum. The operation of federal habeas review according to congressional intent requires that a full opportunity for state



review be given, with due regard for a state's procedural scheme.

In affording meaningful review, a state's choice of the procedures and practices it regards as best facilitating the goal of full and fair presentation of claims must be respected, with their compliance made a requirement for federal habeas review. Moreover, in analyzing the exhaustion issue, federal interpretation of state rules and procedures should faithfully reflect their meaning and application, as employed by the states.

The Third Circuit's equating of jurisdiction with meaningful review plainly intruded upon and misconceived Pennsylvania's judicial system. Similar results have followed from the Sixth Circuit's treatment of state fundamental error rules and the Ninth Circuit approach to flexible procedures, such as California's rule for ineffectiveness claims. In each instance, a fiction of federal law has been created which failed to reflect the state's actual opportunity to review the merits of the claims presented. Where a state has not cut off the availability of review, but rather its opportunity for review has been temporarily precluded by procedural irregularities on the part of the prisoner seeking review, the interests of comity require that review be sought in the state forum.

Each of the three state procedures at issue here serves the goal of complete and fair presentation of claims. Denial of respondent's habeas corpus petition on exhaustion grounds would have been appropriate based on the presence of any one of them. Their confluence only increased the state's—and respondent's—interest in resort to further state remedies, to allow for a complete consideration of respondent's claims. This Court should reverse

the Third Circuit's contrary ill-based decision and deny the petition on exhaustion grounds. In so doing, this Court should insure that federal courts, in determining compliance with § 2254(b), must defer to the procedures and practices which state courts deem necessary for meaningful state court review.

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## CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Third Circuit Court of Appeals be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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(4)



NO. 87-1602

IN THE
# Supreme Court of the United States
October Term, 1988

RONALD D. CASTILLE, District Attorney of Philadelphia County; THOMAS FULCOMER, Superintendent, Huntingdon State Correctional Institute; and LEROY ZIMMERMAN, Attorney General of Pennsylvania,

*Petitioners*

v.

MICHAEL PEOPLES,

*Respondent*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## JOINT APPENDIX

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**Petition for Certiorari Filed March 25, 1988**
**Certiorari Granted May 16, 1988**

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DOCKET ENTRIES

Docket Number—4458 Year '86

PEOPLES, MICHAEL—Plaintiff

FULCOMER, THOMAS, SUPERINTENDENT, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY—Defendants

CAUSE Habeas Corpus

(Cite the U.S. Civil Statute under which the case is filed and write a brief Statement of Cause)

Related to CA 85-2031

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DOCKET ENTRIES

*MAG. NAYTHONS****

| Date | NR. | Proceedings |
|---|---|---|
| 1986 | (M.K.) | 86-4458 |
| 1 JULY | 28 | Relator's Petition for Writ of Habeas Corpus with statement in support of Request Proceed In Forma Pauperis, filed. |
| 2 | " 28 | ORDER THAT PETITIONER IS GRANTED LEAVE TO PROCEED IN FORMA PAUPERS INCLUDING FILING OF NOTICE OF APPEAL, FILED. 7/28/86 entered & copy mailed. |
| — | " 28 | Referred to Magistrate Naythons. |
| 2 AUG | 06 | ORDER DATED 8/5/86, NAYTHONS, U.S. MAGISTRATE, THAT THE D.A. OF PHILA. CO IS ADDED AS A PARTY RESPONDENT AND THE CAPTION IS HEREBY SO AMENDED; SPECIFIC AND DETAILED ANSWERS SHALL BE FILED WITHIN 20 DAYS, TOGETHER WITH A MEMO OF LAW, ETC., FILED. 8/6/86: Entered and copies mailed. |
| — | " 20 | State court record received, forwarded to Magistrate Naythons. (Given to George Miller) |
| 3 | " 20 | DEFT., RONALD D. CASTILLE, D.A. OF PHILA.'S MOTION FOR ENLARGEMENT OF TIME TO FILE RESPONSE, CERT. OF SERVICE, FILED. |
| 4 | " 25 | ORDER DATED 8/25/86, NAYTHONS, U.S. MAGISTRATE, THAT RESPONDENTS' TIME FOR FILING A RESPONSE IS EXTENDED TO 9/17/86, FILED. 8/25/86: Entered and copies mailed. |



| | | |
|---|---|---|
| 5 SEPT | 08 | ORDER DATED 9/6/86, KATZ, J., THAT RESPONDENT'S TIME FOR FILING A RESPONSE IS EXTENDED TO SEPTEMBER 17, 1986, FILED. |
| 6 | " 17 | RESPONDENT, RONALD D. CASTILLE, D.A. OF PHILA. CO.'S MOTION FOR ENLARGEMENT OF TIME TO FILE RESPONSE, CERT. OF SERVICE, FILED. |
| 7 | " 17 | Pretrial telephone conf., 9/15/86, Green, J., filed. |
| (6) | " 19 | ORDER THAT RESPONDENT'S TIME FOR FILING A RESPONSE IS EXTENDED TO 9/26/86, FILED. 9/19/86: Entered and copies mailed. |
| 8 | " 30 | Ronald D. Castille, D.A. of Phila.'s response to petition for Writ of Habeas Corpus, cert. of service, filed. |
| 9 OCT | 16 | PLFF'S MOTION FOR IN FORMA PAUPERIS COPIES OF STATE TRIAL TRANSCRIPTS, CERT. OF SERVICE FILED. |
| 10 | " 20 | Petitioner's traverse to respondent's answer, cert. of service, filed. |
| 1987 | | |
| 11 MAR | 09 | Withdrawal of D.G. Zucker, Esq., for Thomas Fulcomer, filed. |
| — | " 09 | Appearance of Elizabeth J. Chambers, Esq., for Thomas Fulcomer, filed. |
| 12 APR | 03 | Report and Recommendation of U.S. Magistrate Edwin E. Naythons that the petition for writ of habeas corpus be denied & dismissed without prejudice for failure to exhaust state remedies. It is further recommended that petitioner's motion for this Court to provide him with a complete copy of the state court |

trial transcripts in *Commonwealth v. Peoples* be denied. There is no probable cause for appeal, filed.

4/3/87: Entered and copies mailed.

(12) " 17 ORDER THAT THE REPORT AND RECOMMENDATION OF U.S. MAGISTRATE EDWIN E. NAYTHONS IS APPROVED AND ADOPTED. THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED & DISMISSED WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE REMEDIES; PETITIONER'S MOTION FOR STATE COURT TRIAL TRANSCRIPTS IS DENIED (THE PETITIONER MAY RENEW THIS REQUEST IF HE FILES P.C.H.A. PROCEEDINGS BEFORE THE STATE COURT); THERE IS NO PROBABLE CAUSE FOR APPEAL, FILED.

4/17/87: Entered and copies mailed.

13 " 20 Petitioner's Objections to Magistrate Report/ Recommendation, Cert. of Serv., filed.

14 " 22 ORDER THAT THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED & DISMISSED WITHOUT PREJUDICE FOR FAILURE TO EXHAUST STATE COURT REMEDIES. PETITIONER'S OBJECTIONS TO MAGISTRATE NAYTHONS' REPORT & RECOMMENDATION ARE ALSO DENIED. IT IS FURTHER ORDERED THAT PETITIONER'S MOTION FOR THIS COURT TO PROVIDE HIM WITH A COMPLETE COPY OF THE STATE COURT TRIAL TRANSCRIPTS IN *COMMONWEALTH V. PEOPLES* IS DENIED. THERE IS NO PROBABLE CAUSE FOR APPEAL, FILED.

4/22/87: Entered and copies mailed.



1987

15 APR 28 Plff's Notice of Appeal, filed. (87-1247)
4/29/87: Copies to: E.J. Chambers, Esq., D. Spitz, U.S.C.A., Honorable Marvin Katz

16 " 28 Copy of Clerk's Notice to U.S.C.A., filed.

— " 30 ORIGINAL RECORD TRANSMITTED TO U.S.C.A. (Pleadings #1, 5, 7 & 14 not included)

17 JUN 04 Certified copy of order from U.S.C.A. that Certificate of Probable Cause is granted, filed.

18 " 22 Copy of Appellant's Transcript Purchase Order, filed.

— " 29 Record on appeal return.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 87-1247

ORIGIN: Eastern DC DOCKET NO. Civil 86-4458 DC JUDGE Marvin Katz FILED IN DC 7-28-86 NOA FILED 4-28-87 CASE TYPE CV-Habeas Corpus DOCETED: 4-30-87 CJA ☐ Fee Paid [X] IFP [X] CJA* ☐ USA [X] CPC Granted in USCA 6/3/87 DISCLOSURE Applt./Pet. 6-22-87 STATEMENT Appee./Resp. N/A

TITLE OF CASE

PEOPLES, MICHAEL,

Appellant

vs.

FULCOMER, THOMAS, SUPERINTENDENT, THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

APPEARANCES

APPELLANT:

Robert E. Welsh, Jr., Esquire—6-22-87
Montgomery, McCracken, Walker & Rhoads
Three Parkway, 20th Floor
Philadelphia, PA 19102 563-0650
[Ct. Aptd.—Civil]—6/16/87

APPELLEE/RESPONDENT:

change of address—per 2/16/88 letter
Elizabeth J. Chambers, Esq.—5-5-87
Office of District Attorney
1421 Arch Street
5th Floor
Phila., PA 19102
215-686-5744
[Appellee, Ronald D. Castille, District Attorney]

*Deleted in original



NO. 87-1247

RECORD, EXHIBITS & BRIEF INFORMATION/Filing: 6-26-87 Partial Rec. or Cert. List

Record on Appeal ☐ IMPOUNDED

Covers #
6-22 N.T. Needed Transcript ordered None
Transcript filed in DC: ——.

1st Supp. Record
2nd Supp. Record
Exhibits ☐ REC. RM. ☐ SAFE
Administrative Transcript
6-26-87 Briefing Notice Issued C-6126 Covers #——
9-4-87 Brief for Applt. HD 9-4-87 10cc
10-5-87 Brief for Appee. M.S. 10-5-87 (10cc)
10-22-87 Reply B. for Applt. HD 10-22-87 10cc

• • •

RECORD & BRIEF INFORMATION (Cont.):

Brief of Amicus .....

Brief for Intervenor .....

Appendix 9-4-87 M.S. 3cc

Appee. Appendix .....

Supp. Appendix .....

SUMMARY OF EVENTS
DISMISSALS: Rule 28 [ ]
ARGUED 12/7/87
PANEL Greenberg, Scirica & Hunter, CJ
REARGUED—
JUDGMENT-ORDER ——

OPINION 12/30/87 ☐ Mem. Op. ☐ Signed [X] P.C.
N/P or Pub.
MO —— CO —— DO ——

JUDGMENT 12/30/87. Reversed and Remanded. Costs taxed against appellees.

PET. FOR REHG. 1-13-88 by Aplee, w/serv.(bj)

[X] Denied ☐ Granted [X] In Banc ☐ Panel
1-25-88

Mandate FURTHER stayed to: 4-15-88
Rule 42(b) ——

MANDATE FURTHER STAYED TO: 3-16-88

MANDATE STAYED TO: 2-15-88
MANDATE ISSUED ——
RECORD RETURNED ——
BILL OF COSTS ——

CERTIORARI FILED 3-25-88

☐ Denied [X] Granted 5-16-88 S.C. #87-1602
Reported at ——— F2d ——

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| 1987 | |
| May 5 | Staff Atty. letter to aplt advising case will be submitted to a panel of this Court for a decision on the issuance of a certificate of probable cause; responses due within 15 days of the date of this letter. (sdt) |
| June 3 | Order (*Seitz,* Higginbotham & Sloviter, C.J.) granting request for a certificate of probable cause, filed. (sdt)<br>CC to C of DC |
| June 9 | Letter—Motion dated 6/8/87 from Edward H. Weis, Esq, to be relieved as crt-apptd cnsel for applt, filed. (dt) |
| June 9 | Letter—Response dated 6/9/87 from Elizabeth J. Chambers, Esq, cnsl for applees, to Mr. Weis' let—mot to be relieved as crt-apptd cnsel for applt, filed. (dt) |
| June 16 | Order (Clerk) granting Def. Assn.'s req. to be relieved of apptmt. to represent aplt; the D.A.'s response is noted, filed. (sdt) |



| | |
|---|---|
| July 30 | Motion by aplt. for X of time to file B, filed. (gt) |
| July 31 | Order (Clerk) granting above motion. Aplt. to file & servr B on/before 9-4-87. Cnsel. to notify this office in writing if state court record has not been located by 8-10-87, filed. (gt) |
| Oct 14 | Clerk's letter written at direction of Court requesting a letter (O+3) explaining how this case is affected by this Court's recent decision in *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir. 1987). Counsel to respond within 10 days from date of letter. (as) |
| Oct 23 | Letter dd. 10-23-87 from Elizabeth J. Chambers, Esq., cnsel for appee, rec'd at the direction of the Ct., filed. (sdt) |
| Oct. 26 | Letter dd. 10-26-87 from Robert E. Welsh, Jr., Esq., cnsel for aplt, rec'd at the direction of the Ct., filed. (sdt) |
| 1988 | |
| Feb. 2 | Motion to Stay Mandate by the applee., to and including February 15, 1988 (23 days) w/serv., fld. (bj) |
| Feb. 5 | Order (HUNTER, C.J.) granting above motion, to & incl. 2-15-88, fld. (bj) |
| Feb 11 | Motion to extend stay of Mandate by aplee, to & incl. Mar. 16, 1988, w/serv. fld., (bj) |
| Feb 18 | Order (HUNTER, C.J.) granting above motion to & incl. 3-16-88, fld. (bj) |
| Mar 14 | Motion to further extend stay to mandate to and including April 15, 1988, by the appellees, w/serv., fld. (bj) |

Mar 18 Response in Opposition to Motion to Further extend the Stay of the issuance of the mandate, by the appellant, w/serv. fld., (bj)

Mar 23 Order (HUNTER, C.J.) granting motion to further stay mandate, to and incl. April 15, 1988, fld. (bj)

May 18 Cert. Copy of Order from Clk of Sup. Ct. allowing Certiorari on 5-16-88, fld.

---



DEFENDER ASSOCIATION OF PHILADELPHIA

BY: Benjamin Lerner, Defender, and
Harvey S. Booker, Jr., Assistant Defender

Identification No. 00001
121 North Broad Street
Philadelphia, Pa. 19107
(215) 568-3190

Attorney for Michael Peoples

| | |
|---|---|
| | ) Court of Common |
| | ) Pleas |
| | ) Criminal Trial |
| | ) Division |
| | ) November |
| COMMONWEALTH OF | ) Sessions, 1980 |
| PENNSYLVANIA | ) Nos. 487 (ct. 1), |
| | ) 490 (ct. 2), |
| VS | ) 491 |
| | ) Charges: Arson, |
| MICHAEL PEOPLES | ) Endangering Per- |
| | ) sons, Agg. Assault, |
| | ) Robbery |
| | ) 1/12-16/81 |
| | ) Trial Date: |
| | ) Trial Room: 653 |
| | ) Trial Judge: |
| | ) Honorable James |
| | ) T. McDermott |

## POST VERDICT MOTIONS

TO THE HONORABLE,
THE JUDGES OF THE SAID COURT:

The above named defendant by his attorneys, Harvey S. Booker, Jr., Assistant Defender, Louis M. Natali, Jr., First Assistant Defender, and Benjamin Lerner, Defender, respectfully moves for post verdict relief for the following reasons:

1. Prosecutorial, prejudicial remarks in the assistant district attorney's opening remarks and summation to the jury. The remarks were to homicide cases.

2. The motion to suppress the identification of Mr. James Wright, a commonwealth witness, should have been granted. This witness stated he was called by police and GIVEN A DESCRIPTION OF DEFENDANT. Said hearing was before the Honorable James T. McDermott on January 7, 1981 in Room 653, City Hall.

3. The physical lineup as to this defendant of October 3, 1980 was cancelled because of an alleged material change in his physical appearance. However, he was not advised as to why the lineup was cancelled nor of the possibility of having a subsequent lineup.

4. The Court abused its discretion in permitting evidence of two prior robbery convictions to be used against the defendant to attack his credibility.

5. The Court denied the defendant's requested right to the waiver of a jury trial.

6. The Court permitted the assistant district attorney to use the uncertified notes of testimony of the motion to suppress hearing to attack the credibility of the defendant. The defense did not have access to these notes prior to the time of trial nor did the defense know they were in existence until used as stated above.

7. The Court gave an accomplice charge over the objection of the defense even though the defendant was not charged with criminal conspiracy nor was there any accomplice testimony.

At this writing the defense does not have the benefit of the trial notes of testimony. Therefore we respectfully



request permission to amplify the foregoing and to submit such additional reasons in support of the post verdict motions as should appear in said notes in our request for either a new trial or an arrest of judgment.

Respectfully submitted,

/s/ Harvey S. Booker, Jr.
HARVEY S. BOOKER,
Assistant Defender
LOUIS M. NATALI, JR., FIRST ASSISTANT
Defender, and with them,
BENJAMIN LERNER,
DEFENDER
Attorney for the Defendant
Defender Association of
Philadelphia

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION

| | |
|---|---|
| | ) November Sessions, |
| | ) 1980 |
| COMMONWEALTH | ) No. 487—Arson |
| | ) Endangering |
| vs. | ) Person/ |
| | ) Property |
| MICHAEL C. PEOPLES | ) 490—Simple |
| | ) Assault - Agg. |
| | ) Assault |
| | ) 491—Robbery |

OPINION

CHARLES P. MIRARCHI, JR., A.J.—June 8, 1982

MICHAEL C. PEOPLES, defendant was tried and convicted of Arson Endangering Persons, Aggravated Assault and Robbery, by the HONORABLE JAMES T. MC DERMOTT, sitting with a jury on January 16, 1981. Sentencing was deferred pending the filing of post-trial motions and the conduct of a pre-sentence investigation and a psychiatric evaluation. Post-trial motions were timely filed on January 26, 1981. Subsequently on April 28, 1981, these motions were heard and denied. Thereupon the defendant was sentenced on Bill No. 487, November Term, 1980 to be committed to the State Correctional Institution at Graterford for a period not less than (10) ten years nor more than (20) twenty years. On Bill No. 490, November Term, 1980, the defendant was sentenced to a (10) year period of probation to run concurrently with the sentence imposed on Bill No. 487. On Bill No. 491, November Term, 1980, the sentence was to a period of incarceration of not less than (5) five years nor more than (20)



twenty years to run consecutively to the sentence imposed on Bill No. 487. On May 22, 1981, the defendant appealed the judgment of sentence imposed by this Court to the Superior Court of Pennsylvania. Judge McDermitt was recently elected to the Supreme Court of Pennsylvania and this appeal was assigned to this Court, as Administrative Judge of the Trial Division, for an Opinion.

The evidence at trial established that during the evening hours of August 1, 1980, and the early morning hours of August 2, 1980, the victim, THOMAS GALLAGHER, frequented a neighborhood bar in the Kennsington Section of the City and subsequently went down to Society Hill Section, in the area of 2nd and South Streets, to another bar. Sometime after midnight, the victim walked up Chestnut Street to (15th) fifteenth Street, where he noticed (3) three black males dragging another white man. The victim, being intoxicated did not remember the sequential order of events, however, the evidence established that the victim was brought into the Touraine Apartments located at 1520 Spruce Street, by defendant and a few other men. He was led into the elevator by these men. Shortly thereafter, the victim was found on the (7th) seventh floor of the Touraine Apartments on fire and unconscious. A few minutes later, the defendant was seen hurriedly leaving the apartment building. The defendant was found approximately (3) three hours after the incident in a restaurant near the apartment house with the victim's wallet in his possession. Based on this evidence, the jury found this defendant guilty of Arson Endangering Persons, Aggravated Assault and Robbery.

The defendant was found guilty of Arson Endangering Persons. A person commits a felony of the first degree if

he intentionally starts a fire, or causes an explosion, whether on his property or on that of another, and thereby recklessly places another person in danger of death or bodily injury. 18 Pa. C.S.A. § 3301 (a).

A conviction of Arson demands the establishment of three (3) facts:

1. that there was a fire;
2. that it was of incendiary in nature, and
3. that the defendant was the guilty party, *COMMONWEALTH v. COLON,* 264 Pa. Super. 314, 399 A2d 1068 (1979).

The evidence established that the victim was found burned and unconscious. He was found lying face down with his shirt smoldering on the (7th) seventh floor of the Touraine Apartments. The facts revealed that there were no open flames, exposed wires, or any part of the hallway or building on fire, except for the victim's shirt. Consequently, the testimony established there were no possible sources for an accidental fire. The facts also proved that the victim suffered 2nd and 3rd degree burns over his lower back and hands. The burns were so serious that a skin graft had to be performed while the victim was hospialized.

This defendant was seen entering the apartment building with the victim and also seen leaving hurriedly out of the building only moments before the victim was found. A few hours later defendant was found possessing the victim's wallet. Although there was no direct evidence that this defendant started the fire on the victim, this has never



been a prerequisite to a conviction of Arson. *COMMONWEALTH v. LESLIE,* 424 Pa. 331, 227 A2d 900 (1967).

It is well settled that the test for evaluating the sufficiency of the evidence to support a conviction is whether, viewing the evidence in light most favorable to the Commonwealth, and drawing all reasonable inference therefrom, the trier of fact could have found that all of the elements of the offense had been established beyond a reasonable doubt. *COMMONWEALTH v. SERO,* 478 Pa. 440, 387 A2d 63 (1978). In light of all the evidence presented during defendant's trial, the elements of this offense were clearly established beyond a reasonable doubt. *COMMONWEALTH v. COLON,* supra.

The defendant was also convicted of Robbery. A person commits a Robbery if, in the course of committing a theft, he inflicts serious bodily injury upon another. 18 Pa. C.S.A. § 3701 (a) (1) (i). In the instant case, the evidence established that the defendant was seen entering the apartment with the victim. Moments later the defendant was seen quickly exiting the building minutes before the victim was found burned and unconscious. The victim testified that his wallet had been taken during the incident. Approximately (3) three hours after the incident, the defendant was found possessing the victim's wallet. Evidence of possession of stolen property is not sufficient alone to prove theft, but it may combine with other circumstances surrounding the theft and form sufficient evidence to warrant inference of guilty knowledge. *COMMONWEALTH v. VERMILLE,* 275 Pa. Super 263, 418 A2d 713 (1980). Consequently, the elements of this offense were established beyond a reasonable doubt. *COMMONWEALTH v. TALLON,* 478 Pa. 468, 387 A2d 77 (1978).

The defendant was also convicted of Aggravated Assault. Aggravated Assault is committed if a person attempts to cause serious injury to another, or causes such injury intentionally, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. 18 Pa. C.S.A. § 2702 (a) (1).

The evidence proved that the victim suffered damage to his bladder and pancreas from being kicked repeatedly. He was found burned and unconscious and taken immediately to a nearby hospital. The victim spent a total of (21) twenty-one days in the hospital, (9) nine of which were in the intensive care unit. The victim also received 2nd and 3rd degree burns to his back and hands. This evidence clearly established this offense beyond a reasonable doubt. *COMMONWEALTH v. FRANK*, 263 Pa. Super 452, 398 A2d 663 (1979). *COMMONWEALTH v. DESSUS*, 262 Pa. Super 443, 396 A2d 1254 (1978).

The defendant raised a number of issues in his post-trial motions, each of which will be discussed below:

First, the defendant contends that the district attorney committed prosecutorial misconduct in his opening and closing remarks. Specifically both in his opening and closing, the district attorney stated that this case was similar to a homicide case, in that the victim could offer little testimony. (N.T. 1/13/81 p. 112; 1/16/81 p. 376).

The facts established by the notes of record, indicate that the victim was found on fire and in an unconscious state. (N.T. 1/13/81 p. 170). The victim remembered little of the events which led to this incident. It has been held that allegedly prejudicial remarks must be read in the



context of the case as a whole and with a particular view to the evidence presented. *COMMONWEALTH v. BOONE*, 286 Pa. Super. 384, 428 A2d 1382 (1981), *COMMONWEALTH v. BULLOCK*, 284 Pa. Super. 601, 426 A2d 657 (1981).

The Supreme Court of Pennsylvania has held that a district attorney must have reasonable latitude in fairly presenting his case to the jury and must be free to present his arguments with logical force and vigor. *COMMONWEALTH v. SMITH*. 490 Pa. 380, 416 A2d 986 (1980).

This Court finds that these comments, taken in their entirety did not enrage the passions of the jury as to prejudice them against the defendant and properly overruled the objection.

The defendant next argues that the Court erred when it denied defendant's motion to suppress the identification of the defendant by Mr. Hassano, a security guard, and Mr. Wright, the desk attendant, at the Touraine Apartments, for the reason that said indentifications (sic) were tainted because of a photo array and because the police allegedly gave a description of the defendant to Mr. Wright over the telephone.

Judge McDermott, based on the evidence presented, found that the photo array was not suggestive, even though Judge McDermott did agree that the photo array contained only one photo of a man with a bush hair style. That defendant had an unusual bush which made him distinctive. Furthermore, notwithstanding the photo array, the court concluded that given the uniqueness of the defendant's hair, the scar across his nose, the opportunity

for the witnesses to view the defendant at a distance of approximately three feet, to speak to him and to observe him for at least three minutes, the witnesses had an independent basis for the identification and those witnesses identified the defendant from their own opportunity to observe him at the scene and at the time of this incident.

This Court has reviewed the testimony presented at the Motion to Suppress, and Judge McDermott's findings are clearly supported by the record, specifically:

Mr. Wright testified that he watched defendant enter the building with other men and walk past him towards the elevator. A few minutes later, the defendant and another man came off the elevator and walked quickly to the exit doors. However, defendant walked to the wrong doors and Mr. Wright told defendant he had to use the other doors.

It has been held where witnesses had sufficient basis for identifying defendant independant (sic) from any suggestive police confrontation, alleged undue suggestiveness was not a basis of suppressing the in-court identification of witnesses. *COMMONWEALTH v. JOHNSON,* (Pa. Super. 1981), 436 A2d 645 (1981). *COMMONWEALTH v. SLAUGHTER,* 482 Pa. 538, 394 A2d 453 (1978). *UNITED STATES v. HIGGINS,* 458 F2d 461 (3rd Cir. 1972). Therefore, allowing James Wright to testify at trial that the defendant *MICHAEL PEOPLES* was the person he saw that night at the Touraine Apartments, was not error.

The defendant next contends that he was denied the right to a physical line-up. However, there are no Pennsylvania cases which grant a defendant the right to a line-



up. *COMMONWEALTH v. WALKER,* 275 Pa. Super 311, 418 A2d 737, 741 (1980). In addition, defendant cannot now complain that a 2nd physical line-up should have been granted since it was the actions of defendant himself which caused the first line-up to be cancelled. The facts prove that a physical line-up was scheduled for Mr. Peoples on October 23, 1980, in which there was an order that defendant was not to change his appearance. At the time he was arrested he had an extremely large Afro hair style. However, when defendant appeared for the line-up, his hair was plastered to his head, resulting in a direct violation of the order issued by Judge Collins on October 3, 1980. Therefore this Court finds no error in denying defendant's request for a line-up.

The defendant in his (4th) fourth contention alleges the court abused its discretion in permitting evidence of prior robbery convictions to be used against defendant to attack his credibility.

Prior to the defense putting on their case, a *BINGHUM* hearing was conducted. A pre-sentence report revealed that defendant had two prior robbery convictions occurring in 1973 and 1974. Defendant had served a (2½) two and one-half year term, culminated with (5) five years probation. In 1978 he was convicted of retail theft. These prior convictions, two for robbery and one for theft were crimen falsi and therefore highly pertinent to veracity and credibility. The defendant is (32) thirty-two years of age and his criminal record dates back to 1970, including (22) twenty-two arrests, (11) eleven convictions including (3) three for robbery and other various criminal offenses. (N.T. 4/28/81 p. 35).

The Supreme Court of Pennsylvania in *COMMONWEALTH v. ROOTS,* 482 Pa. 33, 393 A2d 364 (1978) outlined five basic considerations the trial court must balance in determining whether evidence of prior crimes should be admitted for the limited purpose of impeaching defendant's credibility. See also *COMMONWEALTH v. HENDERSON;* (Pa. 1981) 438 A2d 951 (1981).

In applying the fourth factor enumerated in *ROOTS,* supra, to the present case, the evidence presented during trial was in great part circumstantial, although a very important piece of physical evidence, namely the victim's wallet was found on the defendant shortly after the incident. The victim was unable to testify as to who his assailants actually were and the two witnesses identifying Mr. Peoples testified only to Mr. Peoples entering the apartment building with the victim and exiting the apartment building a few minutes prior to the time the victim was found burned and robbed. There was no direct testimony describing the events which occurred between the time the defendant entered and exited the apartment building except for the testimony of the defendant himself. Consequently, the only available means of attacking defendant's credibility was by the use of his prior convictions.

For these reasons, the trial court's ruling allowing impeachment was a sound exercise of discretion since the standards set forth in *COMMONWEALTH v. ROOTS,* supra were met.

Defendant next argues that the Court improperly denied his right to waive a jury trial. This contention is meritless. On January 7, 1981, a suppression hearing was



held with the Honorable James T. McDermott presiding. As a result of that hearing Judge McDermott was obliged to rule upon the credibilities involved in that hearing. Subsequently, those motions were denied.

On January 12, 1981, this case was set for trial again with Judge McDermott presiding. At that time defendant requested a waiver of a jury trial.

The Court believed that the interest of justice required the defendant to have a jury trial and thereby denied defendant's request. This reasoning was based upon the fact that this Court previously heard testimony by the defendant while conducting the suppression hearing and ruled accordingly.

Rule 1101 of the Pennsylvania Rules of Criminal Procedure expressly provide the trial judge with discretion in accepting a criminal defendant's waiver of a jury trial. However, there is no constitutional right to waive a jury trial. As stated in *COMMONWEALTH v. GARRISON,* 242 Pa. Super. 509, 364 A2d 388 (1976), "it is well established there is no constitutional prohibition to court's denial of defendant's request to be tried by a judge sitting without a jury." In addition, the Pennsylvania Supreme Court has sharply criticized the practice of holding a non-jury trial before the same judge who presided at a pre-trial suppression hearing. *COMMONWEALTH v. BAXTER,* 282 Pa. Super. 467, 422 A2d 1388 (1980), *COMMONWEALTH v. PAQUETTE,* 451 Pa. 250, 301 A2d 837, (1973).

This defendant was tried before a jury and was not prejudiced by the fact that Judge McDermott also presided over his suppression hearing. See *COMMONWEALTH v.*

*JOHNSON,* (*Pa. Super.* 1981), 436 A2d 645 (1981). Therefore, this Court properly exercised its discretion and denied defendant's request to waive a jury trial.

The defendant's sixth issue, again is meritless. The use of the notes by the district attorney did not prejudice the defendant in any way. The questions asked the defendant were just a reiteration of what was asked him during the suppression hearing. The defense counsel was given the opportunity to read along with the district attorney.

Secondly, the defendant's credibility was not attacked. The defendant said the same thing from the witness stand as he said in the suppression hearing. He wasn't impeached, therefore he did not need to be rehabilitated. There was no prejudice to this defendant and therefore the use of the notes were not error.

The defendant lastly asserts that the accomplice charge was improper, since the defendant was not charged with criminal conspiracy and there was no accomplice testimony.

The facts established at trial that the defendant was with a group of males who entered the Touraine Apartments. Defendant testified that he entered the building with the victim and a few other men. The witnesses identified the defendant as one of the two men leaving the apartment building shortly before the victim was found burned and unconscious. The prosecution's case was based on both circumstantial and direct evidence. There was no direct testimony that this defendant actually committed the arson and robbery, however, the jury could infer that



this defendant had participated in the offense since the defendant was found in possession of the victim's wallet.

It is well established that an accomplice may be convicted on proof of the commission of the offense and his complicity therein, even though the person claimed to have committed the offense has not been prosecuted or convicted . . . 18 Pa. C.S.A. § 306.

Considering all the testimony of the witnesses and evidence presented, the trial judge was required to instruct the jury on this issue. It is clearly the law of the Commonwealth that the charge of the trial court to the jury must be adjudged in its entirety and not by isolated passages or portions. *COMMONWEALTH v. PORTER,* 449 Pa. 153, 295 A2d 153 (1972), *COMMONWEALTH v. KELLY,* 245 Pa. Super. 351, 369 A2d 438 (1977).

This Court has reviewed the notes of testimony of the court's instruction to the jury and find that the Court's instructions were supported by the testimony presented. Therefore the Court's charge to the jury was proper and complete.

In summary, this Court has carefully reviewed the entire record of this case and finds no harmful, prejudicial or reversible error and nothing to justify the granting of defendant's motions.

BY THE COURT:

/s/ Charles P. Mirarchi, Jr.,
Charles P. Mirarchi, Jr., A.J.

IN THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PHILADELPHIA

---

COMMONWEALTH OF PENNSYLVANIA

VS NO. 1335 Philadelphia, 1981

MICHAEL PEOPLES

---

# BRIEF FOR APPELLANT

---

Appeal from Judgment of Sentence, April 28, 1981, November Term, 1980, Numbers 0487, 0490, and 0491, Court of Common Pleas, Trial Division, Criminal Section, Philadelphia.

VINCENT T. SNYDER, ESQUIRE
Court-Appointed Counsel for Appellant
1312 One East Penn Square
Philadelphia, Pa. 19107

(215) 686-7521

## TABLE OF CONTENTS



## STATEMENT OF QUESTIONS PRESENTED

1. Did the Suppression Court err in failing to grant the defendant's motion to suppress out-of-court and in-court identification because the procedure used was suggestive



and there was not an independent basis for the in-court identification?

Answered in the negative by the court below.

2. Was it prejudicial error for the Municipal Court Judge to deny the defendant's request for a lineup?

Answered in the negative by the court below.

3. Did the trial court err in denying the defendant's *Bighum* Motion and ruling that two of the defendant's prior convictions would be admissible to impeach his testimony?

Answered in the negative by the court below.

4. Did the trial court err in charging the jury on the liability of the defendant for the acts of an accomplice?

Answered in the negative by the court below.

5. Was the sentence imposed on the defendant on the present bills illegal?

Not answered or raised in the court below.

6. Did the defendant receive effective assistance of trial counsel?

Not raised and/or answered in the court below.

## SUMMARY OF ARGUMENT

1. The Suppression Court found that the photo display shown to the two witnesses, Mr. Wright and Mr. Hassano, was defective but found that there was a prior independent basis; however, this finding is not supported by the evidence presented at the hearing.

2. The defendant's request for a lineup was originally granted but subsequently revoked. The revokation was not based on valid reasons and this denial resulted in the denial to the defendant of a fair and unprejudiced identification procedure.

3. The trial court erred in finding that the Commonwealth could introduce into evidence the defendant's prior convictions for robbery and retail theft to impeach his credibility. It is clear from the record that the Commonwealth had other means by which to attack the defendant's credibility and the defendant had no other means of presenting his version of the incident.

4. The court erred when it charged the jury on the liability for the conduct of another or by giving a so-called accomplice charge since there was no evidence that more than one person did any of the alleged acts charged.

5. The defendant was found guilty of arson endangering another person, aggravated assault and robbery. He was given a separate sentence on each one of these charges. Since all of these charges stem from a single incident, the sentence on the arson and aggravated assault charges should have merged with the sentence imposed on the robbery charge.

6. The defendant did not receive effective representation by trial counsel. Trial counsel failed to adequately prepare the defendant's case, removed himself from a lineup causing a subsequent defective identification procedure to be used, did not request necessary points for charge and did not preserve substantial meritorious claims for appellate review.



## ARGUMENT

### I. MOTION TO SUPPRESS IDENTIFICATION

The defendant was arrested on August 2, 1980. Prior to his initial preliminary hearing he moved for a lineup since no prior identification had been made of him by the victim or either of the other civilian witnesses. This request was granted by the Municipal Court Judge, the Honorable John Gardner Colins, who wrote on the short certificate that the defendant was not to change his appearance in any way, prior to the lineup which was scheduled to be held in the Philadelphia Prison's Dentention Center on the evening of October 22, 1980. The defendant was incarcerated at the time of these events and there was no evidence that this order was ever communicated to him. It should be noted at this point that at the time of his arrest which occurred within hours of the alleged incident the defendant's hair was styled in an "Afro" or "bush" which extended approximately a foot to 13" from his head.

On the night of the defendant's lineup, the defendant, who was incarcerated at the time, appeared with his hair "greased" down; however, the hair had not been cut. (N.T. 10/24/80 pp 4-5.)

When the defendant's case was called for the preliminary hearing, his counsel requested a continuance and the scheduling of another lineup. Judge Alan K. Silberstein, in denying the continuance stated, "One of the reasons I am making this order, I am making it clear on the record, is that the public defender walked out of the lineup the night it was scheduled." (N.T. 11/24/80 p 22.)

At the time that these discussions regarding the fact that the defendant had a large bush or Afro hair style were discussed by Judge Silberstein and counsel, both of the identification witnesses were present in the courtroom.

Although the defendant's counsel requested an opportunity, on October 24, 1980, to present evidence concerning the events at the scheduled lineup, this request was denied and the court permitted a photographic array to be shown to both of the eyewitnesses.

It should be noted that on the morning of the defendant's arrest, the police described the physical characteristics of the person they arrested to Mr. Wright, one of the identification witnesses. (N.T. 1/7/81.) Moreover, while being taken to the aborted lineup on October 22, 1980, Mr. Wright was told by the police that the defendant, the man who had been arrested in this incident, would be in the lineup. (N.T. 1/7/81, p.70.) Two days later Mr. Wright and Mr. Hassano were shown a photo display of eight pictures. Only one photo, that of the defendant, was of an individual with a tall Afro. (N.T. 1/7/81, p. 73.) The Suppression Court found this display "defective." (N.T. 1/12/81, p. 177.) but did not explain fully the basis of this ruling. The Suppression Court also found an independent basis for the in-court identification. (N.T. 1/12/81, p. 178.)

The relevant identification testimony came from Mr. Wright, the evening desk clerk at the Touraine Apartments, 1520 Spruce Street, Philadelphia, Pennsylvania, and James Hassano, a security guard, who at the time of this incident was specially employed by a tenant of the Touraine Apartments.



Mr. Hassano testified that on August 2, 1980, at about 2:30 a.m., be (sic) observed four individuals enter the Tourane (sic) Apartments. The four men crossed the lobby and entered an elevator. During this sequence of events, Mr. Hassano stated that he observed these individuals for approximately ten seconds while they waited at the door prior to entering and one and a half minutes as they crossed the lobby and entered the elevator. These four individuals passed Mr. Hassano at a distance of at least eight feet at their closest. (N.T. 1/7/81, pp 6-9). At approximately 2:45 a.m., Mr. Hassano saw two of these four individuals exiting the building. He saw them at distances of from forty feet to five feet away for a period of approximately forty-five seconds. (N.T. 1/7/81, pp 10-11). He stated that the defendant was one of the men whom he saw enter the building and one whom he saw leave. He described the defendant as to his hair style and as to a scar on his nose; however, he misdescribed the scar. (N.T. 1/7/81, pp 40.)

Mr. Wright testified that he was on duty on the night in question and saw a "bunch" of individuals enter the building but did not notice if the defendant was part of the group. (N.T. 1/7/81, p 61.) He claims that he first saw the defendant when he left the biulding but this section of the incident took only a "matter of seconds." (N.T. 1/7/81, p. 63.)

Appellate counsel does not clearly understand what the Suppression Court menat (sic) when it ruled that the photo array was "defective." In fact, the Honorable Charles P. Mirarchi, Jr., who wrote the opinion of the lower court, although he was not the judge who presided over the motion to suppress and the trial, stated that

"Judge McDermott . . . found that the photo array was not suggestive . . ." (Lower Court Opinion, p.8.) Whether the lower court did or did not find that the photo array was suggestive, the record does make it clear that the defendant was not identified as the result of a fair and impartial identification procedure.

While it is true that there is no Pennsylvania case which grants a defendant the right to a lineup, *Commonwealth v. Walker,* Pa. Superior 418 A.2d 737 (1980); where identification is at issue, a timely request for a pretrial or pre-hearing identification procedure should be granted. *Commonwealth v. Sexton,* 485 Pa. 17, 400 A.2d 1289 (1979). In the present case, there was no justifiable reason for denying the defendant's request for a new lineup. The Municipal Court Judge who denied the second lineup did so because of the actions of defendant's attorney in removing himself from the procedure. There was no evidence at all that the order regarding changing his appearance was conveyed to the defendant. Moreover, the testimony was that the defendant had "greased" or "plastered down" his hair. He had not cut it. There was no showing that this alteration was in any way permanent or that it could not be quickly remedied.

In addition to the denial of the lineup, it is clear that the photographic array was suggestive. Both eyewitnesses were present, in the courtroom, while counsel openly and at length discussed the extreme length of the defendant's hair. In addition, shortly after the defendant's arrest, the police called Mr. Wright and the police described to Mr. Wright the man whom they had arrested. Also, when he was being taken to the aborted lineup. Mr. Wright was



told that the man they had arrested would be in that lineup. Two days later, both Mr. Wright and Mr. Hassano, were shown eight photographs and of that eight only one photo, the defendant's, was of a person with a tall Afro. It is beyond reason to believe that any finder of fact could find that such a procedure was in its totality anything but suggestive.

However, suggestively (sic) alone was not the issue. The Suppression Court after finding the photo array "defective," went on and decided that there was an independent basis for the identification.

To determine whether an in-court identification is independent and therefore reliable, the following factors must be considered:

> (1) the manner in which the pretrial identification was conducted; (2) the witness' prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancise (sic) between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification. *Commonwealth v. Levelle,* Pa. Super Ct. 419 A.2d 1269 (1980); *Commonwealth v. Slaughter,* 482 Pa. 538, 546, 394 A.2d 453, 457 (1978) citing *U.S. v. Higgins,* 458 F.2d 461, 465 (3rd Cir. 1972); *Commonwealth v. Cox,* 466 Pa. 582, 588-89, 353 A.2d 844, 847 (1976) (substantially same criteria).

In the present case: (b) (sic) the manner in which the pretrial identification was conducted; (2) the witness' prior opportunity to observe was extremely brief (Mr.

Wright for a matter of seconds and Mr. Hassano for a total of two minutes and twenty-five seconds; (3) there was a discrepancy between the way Mr. Hassano described the defendant's scar on the nose and the actual scar and no testimony as to Mr. Wright ever giving a prior description; (4) there was no previous identification by either witness of any of the other alleged participants; (5) the other previous identifications of the defendant were in highly suggestive circumstances and a period of over five months between the incident and the identification at trial.

From applying the factors mandated by the cases cited, it follows that the in-court identification of the defendant by Mr. Wright and Mr. Hassano should have been suppressed because of the lack or (sic) an independent basis. Accordingly, said identification should be ordered suppressed and this Court should grant the defendant a new trial.

## II. DENIAL OF A LINEUP

The facts relative to the denial of the defendant's request for a lineup appear in the previous section. However, in addition to the argument made there, it must also be noted that *Commonwealth v. Sexton* (supra) requires that where the lineup is denied a specific instruction be given to the jury as to the dangers involved in one-on-one identifications. This was not done as a matter of course in the present case and, therefore, the defendant should be granted a new trial.

## III. DENIAL OF BIGHUM MOTION

Prior to the opening of the defense case the defendant made a *Bighum Motion* (*Commonwealth v. Bighum*,



452 Pa. 554, 307 A.2d 255 (1973)) in an attempt to prevent the Commonwealth from introducing any of his prior convictions in order to impeach his credibility when he testified. As a result of this motion, the trial judge ruled that if the defendant should testify on his own behalf, guilty pleas that resulted from a December 1973 robbery and an October 1978 retail theft could be introduced in order to impeach the defendant's credibility. The court erred in making this determination.

In *Commonwealth v. Bighum* (supra), the court made a significant departure from prior practice when it ruled that curative instructions were insufficient when prior convictions were introduced to impeach the credibility of a defendant who elected to testify. Further, the *Bighum* court held that in certain circumstances a defendant's prior record for *crimen falsi* could not be used to impeach him even if he chose to testify.

In *Commonwealth v. Roots,* 482 Pa. 33, 393 A.2d 364 (1978), the court further discussed which factors should be considered in determining the admissibility of a prior criminal record. That court stated:

> In making the determination as to the admissibility of a prior conviction for impeachment purposes, the trial court should consider: 1) the degree to which the commission of the prior offense reflects upon the veracity of the defendant-witness; (2) the likelihood, in view of the nature and extent of the prior record, that it would have a greater tendency to smear the character of the defendant and suggest a propensity to commit the crime for which he stands charged, rather than provide a legitimate reason for discrediting him as an untruthful person; (3) the age and circumstances of the defendant; (4) the strength of the prosecution's case and the prosecution's need to resort to this evidence as compared with the availability to the

> defense of other witnesses through which its version of the events surrounding the incident can be presented; and (5) the existence of alternative means of attacking the defendant's credibility.

393 A.2d at 367. Moreover, the court held that the burden was *not* on the defendant to show that the prejudicial effect of impeachment far outweighed the relevance of the prior conviction but that burden is upon the prosecution to show that the need for this evidence overcomes its inherent potential for prejudice.

In the present case, it is clear from the trial court's inquiry and the opinion written by Judge Mirarchi that emphasis was placed in both incidents on the strength of the Commonwealth's case and the Commonwealth's ability to attack the defendant's credibility by other alternatives (Part of factor 4 and factor 5 as outlined in *Commonwealth v. Roots,* (supra).

Not only were the factors cited misapplied but no apparent consideration was given to that portion of factor 4 which relates to the availability of other witnesses through which the defendant's version of the events surrounding the incident can be presented.

In the present case, the Commonwealth's evidence, although circumstantial, was ruled sufficient to go to the jury. The defendant's version at the offense, which was substantially the same as that given to the police at the time of his arrest, was that he accompanied the victim and others to the Touraine Apartments, because the victim was going to procure some drugs for the defendant; further, that as collateral for money which the defendant gave the victim, the victim gave the defendant a wallet with no money in it but which contained the victim's identification;



that the victim and all but one of the others in the group then left the defendant and never returned to the site of his eventual arrest and the site where he originally met the victim. Such testimony could have been attacked by recalling the victim and questioning him as to whether or not he was involved in a drug transaction. In contrast, the defendant had no other means of presenting his version of the occurrences of August 2, 1980. In fact, the only defense witnesses were the defendant and an investigator from the Defender Association who testified as to his inability to find defense witnesses.

The factors outlined above were designed to *limit* the admission of prior convictions to situations where its introduction is of *essential* evidentiary value to the prosecution and not unreasonably *unfair* to the defense. *Commonwealth v. Roots,* 393 A.2d at 367. (Emphasis provided.)

Since the admission of the defendant's prior convictions were not essentiel to the prosecution and grossly prejudicial to the defendant, the Court erred in permitting their admission and the defendant should be granted a new trial.

## IV. CHARGE ON ACCOMPLICE LIABILITY

At the conclusion of the trial and over the objections of the defense, the trial court charged the jury to the effect that the defendant could be found guilty of the charges involved if the jury found that the acts which were the basis of those charges were committeed by an accomplice. The giving of such a charge was error.

The Pennsylvania Crimes Code, provides for the liability of a defendant for the acts of an accomplice and defines thusly:

(c) Accomplice Defined.—A person is an accomplice of another person in the commission of an offense if:

(1) with the intent of promoting or facilitating the commission of the offense, he:

(i) solicits such other person to commit it; or

(ii) aids or agrees or attempts to aid such other person in planning or committing it; or

(2) his conduct is expressly declared by law to establish his complicity. 18 C.P.S.A. Section 306(c).

The lower court in its opinion justified the giving of the accomplice charge because the facts established that the defendant was with a group of males who entered the Tourane (sic) Apartments with the victim and witnesses identified the defendant as one of the two men leaving the apartment shortly before the victim was found burned and unconscious. (Opinion pp 14 and 15.) However, it has been held, as a matter of law, that such evidence is insufficient to establish liability for an accomplice.

In *Commonwealth v. Fields,* 460 Pa. 316, 333 A.2d (1975) the Court held that:

> In our view, the Commonwealth's evidence was inadequate, as a matter of law, to establish beyond a reasonable doubt that Fields was an active partner in Gause's intent to shoot Press. Read in the light most favorable to the Commonwealth, the record proves that Fields arrived at the scene of the shooting with "Boonie," the killer; that he *may* have asked Press if he "was from 29;" that after "Boonie" shot Press, Fields ran from the scene with "Boonie." There is nothing in the testimony to indicate Fields had any prior knowledge of Gause's lethal intent or that he in anyway counseled or participated in the shooting. Under the circumstances, the proof left too much to conjecture.

333 A.2d at p. 747.



The Supreme Court of Pennsylvania has held on numerous occasions that while proof of one's status as an accomplice may be established by circumstantial evidence, the proof must lead to more than suspicion and conjecture. *Commonwealth v. McFadden,* 448 Pa. 146, 292 A.2d 358 (1972). It has specifically been that neither mere presence at the scene, *Commonwealth v. Leach,* 455 Pa. 448, 317 A.2d 293 (1974), nor flight from the scene of a crime, *Commonwealth v. Roscioli,* 454 Pa. 59, 309 A.2d 396 (1973) are sufficient either in themselves or together to establish that one is an accomplice in the commission of a crime.

In the present case, there is no evidence whatsoever that the actions taken against the victim were done by any more than one person.

Since as a matter of law neither presence nor flight were sufficient to establish the defendant's status as an accomplice, it was error for the trial court to charge on this point.

## V. SENTENCE

The defendant was found guilty and sentence was imposed on the following charges: Arson endangering persons (sentenced to 10 to 20 years); Aggravated assault (10 years probation concurrent with the arson charge); Robbery (5 to 10 years consecutive to the arson charge).

On all of the charges the named victim was Thomas Gallagher and all of these crimes occurred on August 2, 1980. The facts, as adduced at trial and as summarized by the lower court in its opinion clearly established that all of these crimes grew out of the same transaction and were part of a single act.

A classic definition of merger can be found in *Commonwealth v. Ashe,* 343 Pa. 102, 21 A.2d 920 (1941) where the court stated:

> The true test of whether one criminal offense has merged in another is *not* (as is sometimes stated) whether the two criminal acts are "successive steps in the same transaction" but it is whether one crime *necessarily involves* another, as, for example, rape involves fornication, and robbery involves both assault and larceny. The "same transaction" test is valid only when "transaction" means a *single act.* When the "transaction" consists of two or more criminal acts, the fact that the two acts are "successive" does not require the conclusion that they have merged. Two crimes *may be* successive steps in *one* crime and therefore merge, as, e.g., larceny is merged with robbery, and assault and battery is merged in murder, or they may be two distinct crimes which do not merge.

21 A.2d at 291.

In the present case, the defendant was charged with (sic) found guilty of robbery, in that in the course of committing a theft he inflicted serious bodily injury on another. The method of inflicting that injury was the setting of a fire on the back of the robbery victim, Thomas Gallagher. Since the assault and the arson were the means by which the defendant inflicted the serious bodily injury upon the robbery victim, they are all part of a single act and since they comprise a mandatory element of the crime of robbery they must be deemed to merge for sentencing purposes.

Accordingly, if this court does not see fit to grant any of the other relief previously requested it should vacate the sentences imposed on Bills of Information November



Term, 1980 #487 (Arson) and #490 (Aggravated Assault).

## VI. EFFECTIVENESS OF COUNSEL

The defendant was denied effective assistance of counsel for numerous reasons. Some of the actions or admissions are ascertainable from the record; however, because the trial court refused to grant the defendant a hearing at the time of argument on his post-trial motions when he attempted to raise this issue, the record is silent as to other alleged ineffective acts. (N.T. 4/28/81, p. 6.)

Normally, "issues" not raised in post-trial motions will not be considered on appeal. An exception to this exists, however, when ineffective assistance of prior counsel is raised. The rule then is that ineffectiveness of prior counsel must be raised at the earliest stage in the proceedings at which counsel whose ineffectiveness is being challenged no longer represents the appellant. See *Commonwealth v. Seachrist,* 478 Pa. 619, 387 A.2d 661 at 663 (1978)

In the present case, the appellant's present counsel did not represent him during trial; therefore, the issue of trial counsel's ineffectiveness is properly raised in this appeal.

The often quoted standard used in determining whether a defendant has received effective assistance of counsel is " . . . counsel's assistance is deemed constitutionally effective once we are able to conclude that the particular course chosen by counsel had some reasonable basis designed to effectuate his client's interest." *Commonwealth ex rel. Washington v. Maroney,* 427 Pa. 599 (1967). The test is not "whether other alternatives were more reason-

able, employing a hindsight evaluation of the record. Although weigh the alternatives we must, the balance tips in favor of a finding of effective assistance as soon as it is determined that trial counsel's decision had any reasonable basis." *Commonwealth v. Weaver,* 219 Pa. Superior 274 (1971).

In the present case, the defendant was represented by the Defender Assocation of Philadelphia and it and its representatives will be referred to in this brief as trial counsel even though more than one person's acts are being referred to.

First, trial counsel intentionally absented himself from a scheduled lineup which the defense had requested for reasons unrelated to the defendant's case. The facts surrounding this action are fully described in sections I and II of this Argument. As a result of this action on the part of trial counsel, the defendant was denied the opportunity to participate in a lineup and was subjected to a "defective" photo array identification procedure. In relation to this procedure, trial counsel compounded this error by failing to request a point for charge as to the unreliability of one-on-one identifications as provided by *Commonwealth v. Sexton,* (supra).

Trial counsel also failed to adequately prepare the defendant's case. The defendant did not see trial counsel until approximately two weeks prior to trial. Because of this delay a potentially helpful witness to the defense was unable to be located in time for trial. This witness was an employee of the restaurant where the defendant was arrested and that restaurant went out of business prior to the trial. This lack of preparedness also extended to failing to discuss with the defendant in time to properly effectu-



ate the defendant's desires, his right to a jury trial or his option to waive a jury trial.

The defendant also alleges that during his trial, trial counsel was under the influence of alcohol, refused to abide by the defendant's wishes in exercising his peremptory challenges, and did not obtain and review with the defendant the notes of defendant's testimony from the suppression hearing, when said notes were available prior to the defendant's testifying at the trial.

Finally, trial counsel was ineffective for failing to preserve in his post-trial motions challenges to the sufficiency and weight of the evidence and for not raising the issue of the illegality of the sentence imposed.

For the reasons outlined in this section, the defendant requests that if a new trial is not granted pursuant to the other arguments presented herein, that this matter be remanded to the lower court for an evidentiary hearing to determine the effectiveness of trial counsel.

## CONCLUSIONS

For the reasons set forth in sections I through IV of the foregoing Argument, the defendant's conviction should be reversed and a new trial ordered. In the alternative, for the reasons set forth in section V of the Argument, sentence should be vacated on Bills of Information # 487 and # 490 and the matter should be remanded to the lower court for an evidentiary hearing pursuant to the reasons set forth in section VI of the Argument.

Respectfully submitted,

/s/ Vincent T. Snyder
VINCENT T. SNYDER, ESQUIRE
ATTORNEY FOR APPELLANT

J-905 (1983)

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| COMMONWEALTH OF PENNSYLVANIA | ) | IN THE SUPERIOR COURT OF |
| v. | ) | PENNSYLVANIA |
| MICHAEL PEOPLES, | ) | No. 1335 Philadelphia 1981 |
| Appellant | ) | |

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ J. Haniel Henry
J. Haniel Henry
PROTHONOTARY

Dated: September 16, 1983

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J-905 (1983)

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| COMMONWEALTH OF PENNSYLVANIA | ) | IN THE SUPERIOR COURT OF |
| v. | ) | PENNSYLVANIA |
| MICHAEL PEOPLES, | ) | No. 1335 Philadelphia 1981 |
| Appellant | ) | |

Filed September 16, 1983

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, November Term, 1980, No. 487, 490, 491.



Before: WICKERSHAM, WATKINS and MONTGOMERY, JJ.

PER CURIAM: FILED SEP 16 1983

Judgment of sentence affirmed.

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J-905 (1983)

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| COMMONWEALTH OF PENNSYLVANIA | ) | IN THE SUPERIOR COURT OF |
| v. | ) | PENNSYLVANIA |
| MICHAEL PEOPLES, | ) | No. 1335 Philadelphia 1981 |
| Appellant | ) | |

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Philadelphia County, November Term, 1980, No. 487, 490, 491.

Before: WICKERSHAM, WATKINS and MONTGOMERY, JJ.

MEMORANDUM OPINION

Appellant Michael Peoples was convicted of arson (endangering persons), aggravated assault and robbery following a jury trial before the Honorable James T. McDermott. Following the denial of post-verdict motions and sentencing, he filed this direct appeal.

On this appeal, appellant raises several issues which are thoroughly discussed by the Honorable Charles P. Mirarchi, Jr., in his opinion dismissing post-verdict motions. These are: (1) whether the suppression court properly denied appellant's motion to suppress identification; (2) whether it was proper to deny appellant's request for

a lineup; (3) whether the trial court erred in permitting the use of two prior convictions to impeach appellant's credibility; and (4) whether it was error for the trial court to charge the jury on accomplice liability. Our review of the record shows these issues to have been adequately disposed of in Judge Mirarchi's opinion and require no further comment from use (sic).

The other issues argued by appellant were not raised at the trial level. First, appellant argues that the arson and assault convictions merge with the robbery conviction and that it was, therefore, error to sentence him on all three convictions. Because merger questions the legality of the sentence, this issue is not waived because of appellant's failure to raise it before the trial court. *Commonwealth v. Kerr,* 298 Pa.Super. 257, 444 A.2d 758 (1982).

The test for merger is whether one crime necessarily involves the other; that is, the essential elements of one must also be essential elements of the other. *Commonwealth v. Everett,* 290 Pa.Super. 344, 434 A.2d 785 (1981). The Commonwealth's evidence revealed the following facts: the victim was hit on the back of the head; he was kicked in the stomach; he was forced into an apartment building elevator, he was set on fire; his wallet and watch were gone when he was discovered. At least three people were involved in the incident. The victim was unable to recall the precise sequence of events. He spent 21 days in the hospital with injuries to his bladder and pancreas and second and third degree burns to his back and hands. Clearly, arson, which involves intentionally setting a fire which recklessly places another in danger of bodily injury, and robbery, which involves the threat or infliction of



serious bodily injury during the course of committing a theft, do not share the same essential elements. As to the aggravated assault, the jury could have found that the assault took place after the robbery and, thus, the two convictions would not merge.[1] *Commonwealth v. Myers,* 202 Pa. Super. 214, 195 A.2d 813 (1963).

Appellant next argues that trial counsel was ineffective in various respects. Since appellant is now represented, for the first time, by counsel other than trial counsel, this issue is reviewable. *Commonwealth v. Lewis,* 463 Pa. 180, 344 A.2d 483 (1975).

Appellant contends that trial counsel was ineffective because: (1) counsel deliberately absented himself from a scheduled lineup; (2) counsel was inadequately prepared; (3) counsel was intoxicated during the trial; and (4) counsel failed to preserve the issues of merger and sufficiency of the evidence in post-trial motions. These arguments are without merit.

The lineup at which counsel was not present was cancelled due to appellant's own actions in altering his appearance. Since there was no lineup, counsel's absence could not prejudice appellant. *Commonwealth v. Knox,* Pa.Super. , 450 A.2d 725 (1982). Appellant's allegations that trial counsel was inadequately prepared and intoxicated are belied by the record and appellant has not offered any evidence from which we, or the trial court, could

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1. Robbery itself does not necessarily include the elements of aggravated assault since a robbery may be committed by putting another in fear of immediate serious bodily injury even though no injury is actually inflicted. 18 Pa.C.S.A. § 3701.

conclude that such was the case. We will not consider appellant's claim without such specific factual allegations. *Commonwealth v. Pettus,* 492 Pa. 558, 424 A.2d 1332 (1980).

Counsel's failure to preserve the issues of merger and sufficiency of the evidence have not worked any prejudice to appellant either. As stated above, the issue of merger has not been waived and is meritless anyway. The issue of the sufficiency of the evidence is adequately disposed of by Judge Mirarchi in his opinion and we have nothing to add to his analysis. Although error may have occurred, appellant has not shown how that error has prejudiced him and he is, therefore, not entitled to relief. *Commonwealth v. Knox, supra.*

Judgment of sentence affirmed.

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IN THE SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

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| Commonwealth of Pennsylvania | ) | Re: Superior Court of Pennsylvania No. 1335 Philadelphia, 1981 |
| v. | ) | |
| Michael Peoples, Appellant | ) | Misc. dkt. No. ——— |

PETITION FOR ALLOWANCE TO FILE APPEAL TO REVIEW ERRORS OF SUPERIOR COURT WITH APPOINTMENT OF NEW COUNSEL

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SAID COURT:

Comes now, Michael Peoples, pro se, who respectfully submits this petition or allowance to appeal pursuant to 42 Pa. C.S.A. Section 524 and Rules of Appellate Procedure, 1113 et seq. and he assigns these reasons:

1. Petitioner Michael Peoples is confined at State Correction Institution in Huntington, Pennsylvania where he is serving sentence of fiftee.. (15) years to fourty (40) years imprisonment by the Honorable James McDermott of the Common Pleas Court of Philadelphia County after jury conviction for arson and robbery at Nos. 487 and 491 November Term, 1980.

2. On September 16, 1983 the Superior Court of Pennsylvania, No. 1335 of Philadelphia, 1981 affirmed judgment of sentence and conviction for which this current pro se petition for allowance for appeal is being filed.

3. Petitioner believes that he was denied his Federal and State constitutional rights to have effective as-

sistance of counsel during the State's first direct appeal in violation of, *Douglas V. California,* 372 U.S. 353 (1963) because court appointed appellate counsel, Vincent T. Snyder, Esquire failed to raise and argue meritorious claims of error during trial, at post-verdict and post-sentence levels and stages of this case and failed to raise and argue ineffectiveness of former counsel who represented this petitioner in the following errors which occurred to prejudice petitioner:

(a) Notice of direct appeal had been filed in this case to Superior Court on May 5, 1981, but Honorable Judge James McDermott, who was then Common Pleas court Judge, although duly served with copy of notice of appeal; failed to follow Pennsylvania Rules of Appellate Procedure to timely write or file any opinion for petitioner's direct appeal.

(b) Thus, petitioner suffered prejudice as a result of Honorable Judge McDermott's failure to write or file any timely opinion as required by law; all of which denied petitioner his rights afforded to all other citizens accused of crimes in Pennsylvania and therefore denied petitioner his Federal and State constitutional rights to have access timely to the appellate court to review his legal claims inviolation (sic) of the first, sixth, eighth and fourteenth amendments of the United States Constitution. *Bounds V. Smith,* 430 U.S. 817 (1976) because petitioner suffered *intentional inordinate* delay from the time of filing his direct appeal; a period of inactivity occured over one full year until another Judge, The Honorable Charles P. Mirarchi, Jr. wrote and filed an opinion in this case dated June



8, 1982. However, during that period of intentional delay petitioner was caused to suffer prejudice of incarceration with any effective or meaningful appeal review under the sentence imposed in this case.

(c) Furthermore, petitioner was prejudiced because Honorable Judge James McDermott failed to write and file opinion as required by law when he deliberately and intentionally refused and failed to perform his Judicial duties and responsibilities as a Common Pleas Court Judge at a time when he was too busy participating in a campaign and election for Justice of the Pennsylvania Supreme Court; all of which then resulted in no opinion being written and filed in this case to cause not only delay and incarceration of petitioner, but, moreover, then required a substitution of Judges to write and file the lower court's opinion; the Honorable Charles P. Mirarchi, who was not the presiding trial Judge nor post-verdict motions Judge and merely substituted for former Judge McDermott although petitioner never knowingly nor intentionally waived his rights and in fact exercised his rights to have Judge McDermott write and file the opinion required by law when he had timely served Judge McDermott with copy of the notice of appeal. This State procedure denied petitioner his Federal constitutional rights for a full and fair hearing over his legal claims; in violation of equal protection and due process of the laws under the Fourteenth Amendment of the United States Constitution.

(d) Trial counsel was ineffective for failing to object and failing to raise and argue the trial prosecutor's prejudicial misconduct during the trial before the jury when

the prosecutor *intentionally* cross-examined petitioner on the witness stand when he testified on his own behalf as the defendant about other prior criminal convictions; all of which violated clear and express State Statute prohibitions for examining the defendant when he testifies as a witness in his own behalf. See (attached exhibits submitted hereto State Trial Transcript, Page 282 which shows prosecutor Mr. Bello's illegal cross-examination of defendant before the jury.)

This prosecutorial misconduct violated State Statute which all other similarly situated State citizens where and are entitled to receive a fair trial under the established criminal procedural standards. See, 19 P.S., Section 711; repealed substantially the same; 42 Pa. C.S.A., Section 5918.

Also see, *Commonwealth V. Schmidt,* 463 A. 2d 1175 (July 29, 1983)

Appellate counsel, Vincent T. Snyder, Esquire, rendered ineffective assistance of counsel on direct appeal for failing to raise and to argue the above meritorious claim for relief before Pennsylvania Superior Court, although petitioner even wrote counsel a letter dated January 20, 1983 and requested him to raise and argue such meritorious claim in his behalf, but counsel failed to reasonably include said claim in his appellate brief and there was no legitimate stratedy (sic) for appellate counsel having failed to perform his legal assistance to raise and argue said claim because petitioner had been deprived his State Statutory right to a fair trial and relief of a new trial was entitled to



petitioner by the prosecutor's intentional prejudicial misconduct to cross-examine petitioner about prior criminal convictions prohibited by Statute.

See, *Commonwealth V. Gray,* 443 A. 2d 330 (1982) (Violation of State Statute not harmless error even where evidence of guilt overwhelming)

(e) The trial court and Superior Court committed error by upholding the unlawful ruling by violating, *Commonwealth V. Bighum,* 452 Pa. 554 to deprive petitioner of his Federal Sixth Amendment constitutional right to present his only meaningful defense of testifying in his own behalf and allowing the Commonwealth to use evidence of unrelated prior robbery and theft criminal convictions before the jury to discredit defendant's trial testimony.

(f) The trial court and Superior Court committed error by ruling unlawfully that petitioner could not have a trial by Judge and forced him to receive a trial by jury when petitioner expressly requested trial by Judge; all of which violated petitioner's Federal and State constitutional rights to equal protection and Due Process of the laws under the Fourteenth Amendment of the United States constitution because all other similarly situated State criminal defendants are granted the choice to have trial by jury or trial by Judge, but petitioner was arbitrarily and capriciously denied by the lower court's ruling denying him the right to trial by Judge when there were no reasonable guidelines for Judges to follow when either allowing or denying trial by Judge. Thus, petitioner was denied Federal Due Process by the State's arbi-

trary and capricious trial Judge procedure which was refused petitioner upon express request.

Compare: *U.S. EX REL. Matthews V. Johnson,* 503 F. 2d 339 (3rd Cir. 1974) (Arbitrarily allowing some defendants voluntary manslaughter legal instruction while refusing others denied Federal Due Process)

Here, the petitioner requested trial by Judge instead of jury, but the lower court refused that request under the false impression that the Commonwealth could force a jury trial upon the criminal accused. But, your Supreme Court held such procedure a violation of the accused's right to seek trial by Judge.

*Commonwealth V. Sorrell,* 456 A. 2d 1326 (1982) Also see, *Commonwealth V. Maxwell,* 459 A. 2d 362 (May 25, 1983)

(g) The pre-trial suppression court and Superior Court both committed error by refusing to suppress an unnecessary suggestive photo array identification irreparable of misidentification of prosecution witnesses, Mr. Wright and Mr. Hassano and for finding that an independent basis existed, when none did, for in-court identification although the in-court identification was "tainted" from the prior unnecessary suggestive photo array procedure wherein petitioner was unduly and unreasonably singled out as only man with large afro hair. Thus, violating petitioner's Federal and State constitutional rights to Due Process of the laws under the Fourteenth Amendment of the United States constitution.

There was no independant (sic) basis for the in-court identifications and the prior 'taint' resulted in an illegal misidentification of petitioner.



See, *United States V. Higgins,* 458 F. 2d 461 (3rd Cir. 1972)

Furthermore, the lower trial court, Municiple (sic) court of Philadelphia County had refused petitioner's request for a pre-trial line-up in order to timely attack and challenge the tainted illegal photo array identifications made by Mr. White and Mr. Hassano, but the Municiple (sic) court denied such line-up for petitioner and violated, *Commonwealth V. Sexton,* 485 Pa. 17 (1979) (Mandating right of the criminal accused for line-up to test validity of identification)

Thus, by denying petitioner the same rights all other State accused citizens are afforded for line-up procedure it deprived the petitioner his rights for a full and fair hearing in the State courts and deprived him equal protection and due process of the laws as guaranteed under the Fourteenth Amendment of the United States constitution.

(h) Trial counsel was ineffective for failing to timely object and pursue raising and arguing constitutional error of prosecution introducing evidence of petitioner's implied guilt; which unconstitutionally shifted burden of proof to petitioner to disprove essential element of crimes charged, to wit, identification, when the prosecution intentionally elicited evidence from its witness, Lt. Margulie about having to cancel an line-up scheduled for identification when they seen defendant and believed that he changed his appearance by having cut his afro hair since time of arrest. (See, State trial transcript Pages 219-220)

That evidence was used unlawfully to show that defendant altered his appearence and thus draw in-

ference of his guilt; all of which unconstitutionally shifted burden of proof to defendant at trial to explain his conduct to disprove essential element of identification; rather than Commonwealth's burden of proving it.

Thus, petitioner's Federal and State constitutional rights were violated by this unconstitutional burden shifting to defendant. Compare: *Commonwealth V. Moyer,* 466 Pa. 464 (1976); *Commonwealth V. Williams,* 463 Pa. 370 (1975); *Mullaney V. Wilbur,* 421 U.S. 684 (1975); *Patterson V. New York,* 432 U.S. 197 (1977)

Trial counsel and direct appeal counsel rendered ineffective assistance for failing to object timely or failing to raise and argue the unconstitutional burden shifting to petitioner to explain his alleged conduct and thus infer his guilt upon essential element of identification or require petitioner to disprove his guilt by explaing (sic) his conduct to the jury not to infer his guilt from allegedly changing or altering his hair appearance following his arrest.

See, *IN RE Winship,* 397 U.S. 458 (1970) (The government must carry the burden of proof at all times upon essential elements of crimes charged beyond a reasonable doubt standard.)

(i) Trial counsel was ineffective and appellate counsel ineffective for failing to raise and argue use of prejudicial unrelated crimes evidence against petitioner before the jury when there was no reasonable nor proper foundation for admissibility of the evidence and that evidence was severally prejudicial to deny



and deprive petitioner his fundamental constitutional right to receive a fair trial before the jury.

The prosecution sought to introduce evidence from the Philadelphia Clerk of Court to show that a court order had been entered for a line-up which also prohibited defendant from changing or altering his appearance in any way until the time of line-up, but there was no evidence showing that defendant was aware of nor in fact given notice of that court order. Thus, the jury was falsely lead to believe that defendant was aware of said court order and deliberately violated the court order; thus committing an unrelated criminal offense, to wit, criminal contempt of court, punishable by imprisonment and fine.

Trial counsel was ineffective for stipulating to this unrelated crimes evidence related to the Clerk of Court so testifying since there had already been adequate testify for the jury to show the line-up was cancelled and that defendant had changed or altered his appearence, thus, introduction of the unrelated crimes evidence, to wit, criminal contempt of court, served no probative value and was extremely prejudicial to deny fair trial. (See, State trial transcript, Page 228-229)

*Commonwealth V. Nichols,* 485 Pa. 1 (1979); *Commonwealth V. Washington,* 488 Pa. 133 (1979); *Commonwealth V. Spruill,* 480 Pa. 601 (1978)

(j) After the Commonwealth rested its case the trial court gave the jury legal instruction, over defense objection, that it could find defendant guilty of the charges

involved if the jury found that the acts which were the basis of the charges were committed by an accomplice. That legal instruction was error and in violation of State law and also unconstitutional because it allowed the Commonwealth to obtain its criminal conviction on pure speculation, surmise, guess-work and conjecture without any evidence to satisfy proof beyond a reasonable doubt.

See, *In Re Winship,* 397 U.S. 458 (1970)

Here, the only evidence submitted by the Commonwealth was that petitioner had been seen with a group of other men going into the same aparyment (sic) building and coming out therefrom and then finding the victim burned and robbed.

Your Supreme court has often held "mere presence" with another and "flight" are insufficient to establish conviction under the principle of accomplice theory.

See, *Commonwealth V Fields,* 460 Pa. 316 (1975); *Commonwealth V. McFadden,* 448 Pa. 146 (1972)

Moreover, the lower court's legal instruction to the jury was unconstitutional because it illegally shifted the burden to the defendant to disprove his guilt when the Commonwealth was allowed to draw upon inferences of guilt for essential elements when petitioner's mere presence and flight with other men had been shown; thus, violating the unconstitutional burden shifting rational of the United States Constitution.

See, *Standrom* (sic) *V. Montana,* 442 U.S. 510 (1977)

WHEREFORE, for all of the foregoing reasons your Honorable Supreme Court should grant the pro se petition of Michael Peoples for allowance to appeal the constitutional and Statutory errors of the lower court and the Superior court and to order appointment of new counsel who can raise and argue ineffective assistance of former trial, post-verdict and appellate counsel.



Respectfully Submitted,

_____

DISTRICT ATTORNEY'S OFFICE
1300 CHESTNUT STREET
PHILADELPHIA, PENNSYLVANIA 19107

(SEAL)

EDWARD G. RENDELL
DISTRICT ATTORNEY

October 31, 1983

Marlene F. Lachman, Prothonotary
Supreme Court of Pennsylvania
Room 468—City Hall
Philadelphia, Pennsylvania 19107

Re: Commonwealth v. Michael Peoples
No. 617 E.D. Allocatur Docket 1983

Dear Ms. Lachman:

Defendant requests appointment of counsel to assist him in filing a Petition for Allowance of Appeal. The Commonwealth requests this court to remand this matter to the Honorable Charles P. Mirarchi, Jr. for a decision on whether defendant is entitled to appointment of free counsel, pursuant to this court's usual practice.

The Commonwealth will not, therefore, respond to defendant's numerous *pro se* complaints of ineffective assistance of counsel at this time. If this court wishes a response on the merits of these claims, the Commonwelth will file a prompt answer upon request.

Respectfully submitted,

/s/ Robert B. Lawler
Robert B. Lawler
Chief, Appeals Division

cc: Michael Peoples

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[PENNSYLVANIA SUPREME COURT ORDER]

November 14, 1983. Petition for appointment of counsel to file petition for allowance of appeal granted. Matter referred to Court of Common Pleas of Philadelphia for appointment of counsel to assist petitioner in filing a petition for allowance of appeal, which shall be filed within thirty days of counsel's appointment. Notice of counsel's appointment to be given promptly to this Court.

/s/ Per Curiam

Mr. Justice McDermott did not participate in this matter.

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IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 617 E.D. ALLOCATUR DKT. 1983

COMMONWEALTH OF PENNSYLVANIA
Respondent

vs.

MICHAEL PEOPLES
Petitioner

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PETITION FOR ALLOWANCE OF APPEAL

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PETITION FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE SUPERIOR COURT DATED SEPTEMBER 16, 1983 AT NO. 1335 PHILADELPHIA, 1981 AFFIRMING THE JUDGMENT OF THE SENTENCE OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY ON APRIL 28, 1981, NOVEMBER TERM, 1980, NOS. 0487, 0490 and 0491

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STEPHEN P. GALLAGHER, ESQUIRE
STACK & GALLAGHER, P.C.
1600 Locust Street
Philadelphia, Pa. 19103
(215) 735-6500
Attorney for Petitioner

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STATEMENT OF QUESTIONS INVOLVED

I. WHETHER PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, BOTH AT THE TRIAL AND APPELLATE LEVEL IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE FEDERAL AND PENNSYLVANIA CONSTITUTIONS.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | ) | NO. 617 |
| vs. | ) | E.D. ALLOCATUR DTK. 1983 |
| MICHAEL PEOPLES | ) | |

PETITION FOR ALLOWANCE OF APPEAL
TO THE CHIEF JUSTICE AND JUSTICES OF THE SAID COURT:

Petitioner, Michael Peoples, by his attorney, STEPHEN P. GALLAGHER, ESQUIRE, herewith applies to this Honorable Court for allowance of appeal of an Order of the Superior Court filed on September 16, 1983 wherein the Superior Court of Pennsylvania affirmed a judgment of the Court of Common Pleas of Philadelphia County.

The Petitioner, Michael Peoples, who was represented by the Public Defender was tried before a jury with the Honorable James McDermott presiding and was found guilty of Arson, Endangering Persons, Aggravated Assault and Robbery on January 16, 1981. Post-trial Motions were argued on April 28, 1981, said Motions were denied and the Petitioner was sentenced as follows: On Bill No. 487—November Term, 1980—to be committed to the State Correctional Institution at Graterford for a period of not less than ten (10) years nor more than twenty (20) years; on Bill No. 490—November Term, 1980—the Petitioner was sentenced to a ten (10) year period of probation to run concurrently with the sentence imposed on Bill No. 487; on Bill No. 491—November Term, 1980—the sentence was to a period of incarceration of not less than five (5) years nor



more than twenty (20) years to run concurrently to the sentence imposed on Bill No. 487.

An Opinion was filed by the Honorable Charles P. Mirarchi of the Court of Common Pleas who was assigned the case for that purpose, as Judge McDermott was elected to the Supreme Court of Pennsylvania. Said Opinion is attached hereto and marked Exhibit "A".

The Petitioner appealed the Judgment of Sentence to the Superior Court of Pennsylvania.

Petitioner was represented on said appeal by court-appointed counsel who was not trial counsel. Petitioner's appellant (sic) counsel raised one issue that was not raised in the lower Court. Said issue alleged that petitioner was deprived of effective assistance of counsel in that his trial counsel:

(a) failed to show up at a scheduled line up thereby denying him a line up;

(b) counsel was inadequately prepared;

(c) counsel was intoxicated;

(d) counsel failed to preserve issues of merger and the issue, sufficiency of the evidence.

Petitioner's appellant (sic) counsel failed to raise in his appeal the issues whether trial counsel was ineffective in failing to preserve the issue; that the Commonwealth's representative committed reversible error in cross-examining the petitioner as to his prior criminal record in violation of the Pennsylvania Statute, 42 Pa. C.S. § 5918. Petitioner's attorney on appeal to the Superior Court also failed to raise on appeal the issue that the trial Court committed reversible error in refusing petitioner's Motion

to Suppress the physical evidence and statement as such evidence was obtained as a result of an alleged arrest.

Petitioner by his new appellant (sic) counsel who did not represent him at trial nor did he represent petitioner on his direct appeal to the Superior Court, files this Petition for Allowance of Appeal for the following reasons:

A. It is absolutely clear from the record that the Assistant District Attorney in this case cross-examined the Petitioner concerning his prior criminal record. The record reads as follows:

CROSS-EXAMINATION

BY MR. BELLO:

Q. MR. PEOPLES, SO WE CAN CLARIFY THIS, YOU WERE GUILTY OF ROBBERY, 1973, IS THAT CORRECT?

A. YES.

Q. YOU WERE GUILTY OF ROBBERY IN 1974, IS THAT CORRECT?

A. THAT IS CORRECT.

Q. YOU WERE GUILTY OF RETAIL THEFT IN 78, IS THAT CORRECT?

A. THAT IS CORRECT.

(N.T. p. 282)

Q. WAIT A MINUTE, MR. PEOPLES. THE ONLY ONE SAYING THAT IS YOU, WHO HAS TWO ROBBERY CONVICTIONS, ONE THEFT CONVICTION — —

MR. BOOKER: OBJECTION, YOUR HONOR. THIS IS JUST ARGUING BACK AND FORTH.

(N.T. p. 300)



Under the case law of *Commonwealth v. Moore,* 369 A.2d 862 246 Pa. Super. 163 (1977) and *Commonwealth v. Vicki Schmidt,* 463 A.2d 1175 (1983), this cross-examination was clearly reversible error and the Supreme Court should allow this Petition for Allowance of Appeal and reverse the judgment of the trial Court and grant a new trial.

Further, at the Suppression Hearing in this case, the arresting officer clearly stated that the Petitioner was arrested "for investigation", a term which clearly is the opposite of "probable cause". Suppression N.T. p. 89 and p. 96. Therefore, the physical evidence and the statement obtained as a result of this illegal arrest should have been suppressed.

There does not appear from this record any reasonable basis designed to effectuate the Petitioner's interest in appellate's counsel's failure to raise on appeal the trial court's refusal to suppress the physical evidence and the oral statement obtained as a result of an "arrest for investigation". Therefore, Petitioner claims he was denied effective assistance of counsel on his direct appeal and requests this Court to grant the Petition for Allowance of Appeal and decide the issue directly or in the alternative, grant the Allowance of Appeal and remand this case for an evidentiary hearing (See *Commonwealth ex rel. Washington v. Maroney,* 427 Pa. 599 (1967).)

Petitioner, by his counsel, Stephen P. Gallagher, Esquire, further requests that the Supreme Court allow this Petition for Allowance of Appeal and then remand the case to the trial court in order than an evidentiary hearing can be held to determine whether or not the issues raised by appellate counsel in the direct appeal constituted ineffec-

tiveness of counsel as this cannot be determined from the record alone.

## CONCLUSION

The Petitioner requests the Supreme Court to grant this Petition for Aliowance of Appeal and to decide the substantial issues raised in this Petition or in the alternative, grant the allowance of appeal and remand this case to the trial court for an evidentiary hearing.

Respectfully submitted,

/s/ Stephen P. Gallagher
Stephen P. Gallagher, Esquire
Attorney for Petitioner

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(SEAL)

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

November 8, 1985

Stephen P. Gallagher, Esquire
STACK & GALLAGHER
1600 Locust Street
Philadelphia, PA 19103

Re: COMMONWEALTH OF PENNSYLVANIA v. MICHAEL PEOPLES, Petitioner No. 617 E.D. Allocatur Docket 1983

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Dear Mr. Gallagher:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"November 4, 1985.

Petition Denied.

Mr. Justice McDermott did not participate in the consideration or decision of this matter.

Per Curiam."

Very truly yours,
/s/ Patrick Tassos
Patrick Tassos
Deputy Prothonotary

/pj
cc: Robert B. Lawler, Esquire

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
FORM FOR USE IN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2254

(Full name): Michael Peoples, PETITIONER

(Include name under which you were convicted)

CASE NO. 86-4458. (Supplied by the Court)

vs.

(Name of Warden, Superintendent, Jailor, or authorized persons having custody of petitioner): Thomas Fulcomer, Superintendent, RESPONDENT.

and

Additional Respondent: THE ATTORNEY GENERAL OF THE STATE OF Pennsylvania.

Name: Michael Peoples; Prison Number: M-4559

Place of Confinement: Drawer R State Correctional Inst. Huntingdon, Pa. 16652

[DIRECTIONS DELETED]

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Philadelphia Criminal Division, Court of Common Pleas
2. (a) Date of Judgment of conviction: 1/16/81

   (b) Indictment number or numbers: 0487, 0490, 0491 November Term, 1980
3. Length of sentence: 15 yrs. to 30 yrs. Sentencing Judge: James McDermott
4. Nature of offense or offenses for which you were convicted: Arson, Robbery, Aggravated Assault, Endangering Welfare of Another Person



5. What was your plea? (*check one*)

   (a) Not Guilty (X) (b) Guilty ( ) (c) Nolo contendere ( )

   If you entered a guilty plea to one count or or indictment, and a not guilty plea to another count or indictment, give details: Not Guilty Please
6. Kind of trial: (*check one*)

   (a) Jury (X) (b) Judge only ( )
7. Did you testify at the trial? Yes (X) No ( )
8. Did you appeal from the judgment of conviction? Yes (X) No ( )
9. If you did appeal, answer the following:

   (a) Name of court: Superior Court, # 1335 Phila. 1981

   (b) Result: Affirmed Judgment

   (c) Date of Result: 9/16/83

   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Allowance to appeal, Pa. Supreme Court #617 E.D. 1983 Denied 1985
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (X) No ( )
11. If your answer to 10 was "yes", give the following information:

    (a) (1) Name of Court: U.S. District Court # 85-2031

    (2) Nature of proceeding: State Prisoner Habeas Corpus Action

    (3) Grounds raised: (1) Violation Due Process, Inordinate Delay by State Supreme Court upon hearing allowance to appeal action. All

issues raised under allowance to appeal incorporated in habeas corpus

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (X)

(5) Result: Denied for failure to exhaust state remedies

(6) Date of Result: 7/25/85

(b) As to any second petition, application or motion give the same information:

(1) Name of Court: None

(2) Nature of proceeding: None

(3) Grounds raised: None

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result: None

(6) Date of result: None

(c) As to any third petition, application or motion, give the same information:

(1) Name of Court: None

(2) Nature of proceeding: None

(3) Grounds raised: None

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result: None

(6) Date of Result: None

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( ) No (X)



(2) Second petition, etc. Yes ( ) No (X)

(3) Third petition, etc. Yes ( ) No (X)

Not applicable because all state remedies were exhausted under direct appeals.

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: Petitioner did file timely direct state court appeals to both Superior and Supreme courts of Pennsylvania without securing relief.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

[PRINTED EXAMPLES DELETED]

A. Ground one: Violation of Mandatory State Statutory law and denial due process 14th amendment in state' arbitrary and capricious refusal of affording relief to petitioner. Supporting FACTS (tell your story *briefly* without citing cases or law): During trial, before the jury, petitioner was prejudiced, because prosecutor violated 19 P.S. Section 711 (recodified 42 Pa. C.S. Section 5918) by examining petitioner regards other unrelated robbery and theft crimes and this was not harmless error due to extremely weak circumstantial case of the State.

B. Ground two: Denial of due process 14th amendment and equal protection of the laws. Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner requested trial by Judge and not jury, which under state law he had a right to do, but trial court mistakenly ruled that he had no right to Judge trial and that commonwealth had right to trial by jury and thus petitioner was denied his state law right enjoyed by all other state citizens except himself which is arbitrary.

C. Ground three: Petitioner suffered irreparable mistaken identification in violation of 14th amendment due process of the law. Supporting FACTS (tell your story *briefly* without citing cases or law.): The police and prosecution used unreasonably suggestive and tainted identification procedures to secure identification testimony at trial, which had no independant origin and was illegal from prosecution witness Mr. Hassano and Mr. Wright being subjected to unnecessarily suggestive photographic police procedures and trial court errored (sic) to admit in-court identifications.

D. Ground four: Ineffective assistance counsel, violation sixth (6th) amendment. Supporting FACTS (tell your story *briefly* without citing cases or law): Prejudicial to petitioner. Counsel failed to exercise reasonable and normal competence pre-trial and during trial; failed to file to suppress illegal arrest, search and seizure evidence (a second stopping and searching of petitioner by police after police had just moments before stopped and searched him) and highly incriminating evidence gathered thereby; admission of unrelated crimes evidence by Clerk



of court in petitioner changing his hair in contempt of court order.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: All grounds were fairly presented to state courts without any relief being granted to petitioner and state remedies were exhausted.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Court appointed, Harvey Booker, Esq., Public Defender Office.

(b) At arraignment and plea: Same above named.

(c) At trial: Same above named.

(d) At sentencing: Same above named.

(e) On appeal: Vincent T. Snyder, Esq., court appointed.

(f) In any post-conviction proceeding: Petition for allowance to appeal Penna. Supreme court, John Dewaid, Esq., court appointed.

(g) On appeal from any adverse ruling in a post-conviction proceeding: None.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (X) No ( ).

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X).

(a) If so, give name and location of court which imposed sentence to be served in the future: None

(b) And give date and length of sentence to be served in future: None

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes ( ) No (X) Not applicable

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 7-2-86

/s/ Michael Peoples
Signature of Petitioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MICHAEL PEOPLES | ) | CIVIL ACTION |
| | ) | |
| VS. | ) | |
| | ) | |
| THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY | ) | |
| | ) | |
| AND | ) | |
| | ) | |
| THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA | ) | NO. 86-4458 |

REPORT—RECOMMENDATION

EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE APRIL 1, 1987

Michael Peoples, an inmate currently incarcerated at the State Correctional Insitution in Huntingdon, Pennsylvania has filed a *pro se* petition for a writ of habeas corpus. Petitioner was convicted of arson endangering persons, aggravated assault, and robbery following a jury trial before the Honorable James T. McDermott on January 16, 1981. On April 28, 1981, petitioner was sentenced to a total of fifteen to forty (15-40) years imprisonment with a concurrent ten year probation.

On June 8, 1982, Judge Charles P. Mirarchi, Jr., of the Court of Common Pleas filed a written opinion concerning the denial of petitioner's post-trial motions, following the election of the Honorable James T. McDermott

to the Pennsylvania Supreme Court in November of 1981. Among petitioner's post-trial motions was a claim that he was improperly denied a bench trial. This claim was never appealed after the initial denial by Judge Mirarchi.

Petitioner filed a direct appeal to the Pennsylvania Superior Court on May 11, 1983. The Superior Court affirmed the judgment of sentence on September 16, 1983. *Commonwealth v. Peoples,* 466 A.2d 720 (Pa. Super. 1983). The Superior Court rejected petitioner's claim that the Suppression Court erred in failing to suppress identification testimony. Petitioner never appealed this ruling by the Superior Court.

On June 7, 1985, petitioner filed a petition for allowance of appeal to the Pennsylvania Supreme Court. Among the issues raised in this petition, was whether appellant (sic) counsel was ineffective for failing to raise in his appeal that trial counsel was ineffective in failing to preserve the issue; that the prosecutor committed reversible error in cross-examining petitioner as to his prior criminal record in violation of 42 Pa.C.S.A. § 5918. Petitioner's Allocatur appeal was denied on November 4, 1985.[1]

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1. This is petitioner's third petition for a writ of habeas corpus. By Order dated December 5, 1984, petitioner's first petition was denied for failure to exhaust state court remedies. Civil Action No. 84-4061, following this U. S. Magistrate's Report and Recommendation of November 15, 1984. Petitioner's second petition for a writ of habeas corpus was denied for failure to exhaust state court remedies on July 15, 1985 when the District Court approved and adopted this U. S. Magistrate's Report and Recommendation of June 27, 1985, Civil Action No. 85-2031.



## DISCUSSION

A petition for a writ of habeas corpus by a state prisoner will not be entertained by a federal habeas corpus court unless available state court remedies have been exhausted. 28 U.S.C. § 2254(b), (c); *Rose v. Lundy,* 455 U.S. 509 (1982). Absent highly unusual circumstances the Court may not consider the merits of petitioner's claims unless he has exhausted his remedies with respect to each. *Patterson v. Cuyler,* 729 F.2d 925, 929 (3d Cir. 1984); *Santana v. Fenton,* 685 F.2d 71, 74 (3d Cir. 1982), *cert. denied,* 459 U.S. 1115 (1983). The exhaustion doctrine is designed primarily to protect the state court's role in enforcement of federal law and to prevent disruption of state judicial proceedings. *Rose,* 455 U.S. at 518; *Slotnick v. O'Lone,* 683 F.2d 60 (3d Cir. 1982), *cert. denied,* 459 U.S. 1211 (1983).

A federal habeas corpus court will not hear a constitutional claim for the first time unless petitioner demonstrates cause for the failure to properly present the claim to the state courts and prejudice resulting therefrom. *Wainwright v. Sykes,* 433 U.S. 72, 90-91 (1977), *reh. denied,* 434 U.S. 880 (1977). "An exception [to the exhaustion requirement] is made only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief." *Duckworth v. Serrano,* 454 U.S. 1, 3 (1981).

Petitioner's first claim of prosecutorial misconduct, is based upon the prosecutor's cross-examination of petitioner as to his prior criminal record. Petitioner relies on 42 Pa.C.S.A. § 5918 as support for his claim. The only opportunity the Pennsylvania Court's were given to

address this claim was on petitioner's Allocatur appeal to the Pennsylvania Supreme Court. In that appeal petitioner alleged ineffectiveness of appellate counsel for failing to raise this issue and for not raising trial counsel's ineffectiveness in failing to preserve this issue.

The Pennsylvania Supreme Court has refused to consider as finally litigated on its merits, an issue raised solely in an allocatur appeal. *Commonwealth v. Tarver,* 493 Pa. 320, 426 A.2d 569 (1981). An issue not raised in the lower courts is considered waived and cannot be raised for the first time on appeal. Pa.R.A.P., 302(a).

Since the record is void of any indication that the Pennsylvania Courts were properly presented with this issue and ruled on petitioner's claim of prosecutorial misconduct, this U. S. Magistrate cannot conclude that this claim has been exhausted. The procedurally correct way for petitioner to assert the issue of ineffectiveness of counsel and prosecutorial misconduct which has not been previously litigated is to file a petition for relief under Pennsylvania's Post Conviction Hearing Act, 42 Pa.C.S.A. §§ 9541 *et seq.*

Petitioner's second claim is that he was unconstitutionally denied a bench trial. While this claim was raised in post-verdict motions, it was never brought before an appellate court for review. Petitioner must show cause for the failure to present this claim to the state courts and prejudice resulting therefrom, before a federal habeas court will consider this claim. *Wainwright,* 433 U.S. 72.

Petitioner may assert ineffectiveness of counsel as the cause for his failure to properly present claims to the state courts. However, while these grounds for relief remain open it would be improper for this federal habeas court to consider petitioner's ineffectiveness of counsel claim to show cause for a procedural default. "If a petitioner could raise his ineffectiveness claim for the first time on federal habeas in order to show cause for a procedural default, the federal habeas court would find itself in the anomalous position of adjudicating an unexhausted constitutional claim, for which state court review might still be available. *Murray v. Currier,* (sic) — U.S. —, 106 S.Ct. 2639, 2646 (1986).



Petitioner asserts that his identification in court was not admissible as it was a result of illegal and suggestive police procedures. While this claim was raised and denied on its merits before the Pennsylvania Superior Court, it was abandoned on allocatur. Consistent with *Wainwright, supra* the failure to preserve the claim bars federal consideration absent a showing of cause for the default and prejudice resulting therefrom. Petitioner has not demonstrated such to this Court. If petitioner intends to asserts ineffectiveness of counsel as "cause," he must return to the State Courts.

Petitioner also claims that trial counsel was ineffective for failing to file a motion to suppress evidence obtained by an illegal arrest, and that appellate counsel was ineffective in asserting it. These claims were raised for the first time in petitioner's allocatur petition to the Supreme Court. Since this U. S. Magistrate cannot conclude that the Pennsylvania Supreme Court did or would consider the merits of such a claim presented for the first time in an allocatur petition, as previously discussed, these claims cannot be considered by this Court. Petitioner must assert these claims in an action under the Post Conviction Hearing Act.

Petitioner's final claim of trial counsel's ineffectiveness, for failure to object to evidence that petitioner changed his appearance before a line-up, was raised for the first time in this petition for habeas corpus. Therefore, it is clear that petitioner failed to exhaust his state court remedies with respect to this issue. *See, Rose, supra;* 28 U.S.C. § 2254(b).

Petitioner has also filed a request for this Court to provide him with the state trial transcripts in *Commonwealth v. Peoples.* Petitioner has failed to state any reasons for such other than his need to reply to respondent's answers to the habeas corpus petition.

The touchstone of an indigent's motion for a transcript are need and relevance. *United States ex. rel. Williams v. State of Delaware, et al.,* 427 F.Supp. 72, 76 (D.Del. 1976). Indigents are not entitled to a transcript of the trial proceedings for use in habeas corpus matters without a showing of need. *Towler v. Peyton,* 303 F.Supp. 581, 583 (W.D.Va. 1969); citing *United States v. Shoaf,* 341 F.2d 832 (4th Cir. 1964); *United States v. Glass,* 317 F.2d 200 (4th Cir. 1963). Petitioner has not demonstrated the need for the trial transcripts, especially in light of this Court's findings that petitioner failed to exhaust his existing state remedies in claims raised in his habeas petition. It is noted that petitioner's grounds raised in his habeas corpus petition allege no deprivation of requested transcripts or errors contained in the records; indeed he makes no reference to the need for the transcripts at any time.

Accordingly, this United States Magistrate makes the following.



## RECOMMENDATION

NOW, this 2nd day of April, 1987, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be Denied and Dismissed without prejudice for failure to exhaust state court remedies. IT IS FURTHER RECOMMENDED that petitioner's motion for this Court to provide him with a complete copy of the state court trial transcripts in *Commonwealth v. Peoples* be Denied. There is no probable cause for appeal.

/s/ Edwin E. Naythons
Edwin E. Naythons
United States Magistrate

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| MICHAEL PEOPLES | ) | CIVIL ACTION |
| | ) | |
| VS. | ) | |
| | ) | |
| THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY | ) | |
| | ) | |
| AND | ) | |
| | ) | |
| THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA | ) | 86-4458 |

ORDER

MARVIN KATZ, J.

NOW, this 17th day of April, 1987, after careful and independent consideration of relator's petition for a writ of habeas corpus and after review of the Report and Recommendation of the United States Magistrate, it is ORDERED that:

1. The Report and Recommendation is Approved and Adopted.

2. The petition for writ of habeas corpus is Denied and Dismissed without prejudice for failure to exhaust state remedies.

3. Petitioner's motion for state court trial transcripts is Denied.*

---

*Petitioner may renew this request if he files P.C.H.A. proceedings before the State Court.



4. There is no probable cause for appeal.

/s/ Marvin Katz
Marvin Katz, J.
Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| United States of America EX REL. Michael Peoples | ) | |
| Petitioner | ) | |
| Vs. | ) | |
| Thomas Fulcomer, Superintendent, et al., | ) | No. 86-4458 |
| Respondents | ) | |

*Objections To Magistrate Report/Recommendation*

To The Honorable, The Judges Of Said Court:

Pursuant to 28 U.S.C., Section 636 (B) (1) (b) the petitioner files the following objections to the Magistrate report and recommnedation dated April 3, 1987:

1. Petitioner did exhaust his State remedies through an ineffective assistance of counsel claim filed before the Pennsylvania Superior Court who appointed new conflict counsel for such purposes and later with Pennsylvania Supreme Court in a petition requesting allowance for appeal.

   Thus, the Magistrate committed constitutional error because he did raise the ineffective assistance of counsel claim at the first reasonable opportunity to do so which is what Pennsylvania law requires. The claims were properly presented to both Superior and Supreme Court to decide upon the merits and they choose to ignore petitioner's claims and therefore, no further exhaustion is mandated. See, *Swanger v. Zimmerman,* 750 F. 2d 291 (3rd Cir. 1984) "The test of exhaustion



is not whether the state courts have considered a petitioner's claims, but were they given an opportunity to do so."

Petitioner Peoples gave both Superior and Supreme court ample and reasonable opportunity to do so.

2. The Magistrate committed constitutional error, page 3 note 1 when failing to properly find exhaustion after two prior attempts to secure state court remedies upon the constitutional claims raised in this third petition for which the states courts caused inordinate delays of nearly four (4) years while he was under appeal, and thus, "further resort to Pennsylvania courts upon similar claims would be a futile gesture since state remedies already proved to be totally inadequate to protect petitioner's Federal rights."

3. Violation of State Statute, 42 PA. C.S.A., Section 5918 (Magistrate report, page 4) was prosecutorial misconduct so egregious as to amount to penalty for petitioner exercising his right to testify and present a defense on his own behalf. Compare: *Rock v. Arkansas,* No. 86-130, 41 CrL. 4003 U.S. Supreme Court (Right of defendant to present testimony on their own behalf not to be obstructed by state authority).

4. Page 4-5 of Magistrate report is Constitutional error because all citizens, except petitioner, were protected under State Statute law to exercise right to bench trial in felony cases, but petitioner was deprived due process.

5. Constitutional error, page 6-7 counsel rendered ineffective assistance in failing to file proper and timely

fourth amendment violation for illegal arrest and search and seizure of crucial evidence related to identification and supporting prosecution's theory of guilt to obtain conviction. See, *Morrison v. Kimmelman,* — F.2d — (3rd cir. 1985).

Wherefore, the Magistrate report/recommendation should not be approved nor adopted and habeas corpus relief is entitled to petitioner.

Respectfully Submitted,

/s/ Michael Peoples

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

| | | |
|---|---|---|
| MICHAEL PEOPLES | ) | CIVIL ACTION |
| | ) | |
| v. | ) | |
| | ) | |
| THOMAS FULCOMER, SUPERINTENDENT AND THE DISTRICT ATTORNEY FOR PHILADELPHIA COUNTY | ) | |
| | ) | |
| and | ) | |
| | ) | |
| THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA | ) | No. 86-4458 |

ORDER

AND NOW, this 21st day of April, 1987, it is hereby ORDERED that the petition for writ of habeas corpus is DENIED and DISMISSED without prejudice for failure to exhaust state court remedies. The petitioner's objections to Magistrate Naython's Report and Recommendation are also DENIED. It is further ORDERED that petitioner's motion for this Court to provide him with a complete copy of the state court trial transcripts in *Commonwealth v. Peoples* is DENIED. There is no probable cause for appeal.

BY THE COURT:

/s/ Marvin Katz
MARVIN KATZ, J.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1247

PEOPLES, MICHAEL,

*Appellant*

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 86-4458

Argued December 7, 1987

Before: GREENBERG, SCIRICA, and HUNTER,
*Circuit Judges*

Opinion filed December 30, 1987

ROBERT E. WELSH, JR. (Argued)
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Attorneys for Appellant

ELIZABETH J. CHAMBERS (Argued)
Assistant District Attorney
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
RONALD D. CASTILLE
District Attorney
1421 Arch Street
Philadelphia, PA 19102
Attorneys for Appellees



OPINION OF THE COURT

PER CURIAM:

1. Appellant Michael Peoples seeks a writ of habeas corpus. The District Court, adopting the report and recommendation of a U. S. Magistrate, dismissed his petition on the grounds that Peoples had not exhausted his state court remedies.

## I. BACKGROUND

2. Following a jury trial in the Philadelphia Court of Common Pleas in 1981, Peoples was convicted of arson, endangering persons, aggravated assault and robbery. His post-verdict motions for a new trial were denied, and the conviction was affirmed by the Pennsylvania Superior Court in September, 1983. The following month, Peoples filed in the Pennsylvania Supreme Court a pro se "Petition for Allowance to File Appeal to Review Errors of the Superior court with Appointment of New Counsel" ("pro se petition"). The Supreme Court granted the request for appointment of counsel "to assist [Peoples] in filing a Petition for Allowance of Appeal," but did not discuss the merits of the claims raised in the pro se petition. Appendix at 170a. People's new counsel filed a Petition for Allowance of Appeal ("counseled petition") in June, 1985. The counseled petition was denied without opinion on November 4, 1985.

3. Prior to the denial of allocatur in 1985, Peoples had filed two petitions for writ of habeas corpus in federal District Court, each of which was denied for failure to exhaust state remedies. Peoples filed the current petition

for habeas corpus on July 28, 1986. The matter was referred to Magistrate Naythons, and the Philadelphia District Attorney filed a response contending that Peoples had not exhausted his state remedies. In his pro se reply to the response, Peoples directed the court's attention to his pro se petition for allocatur, and argued that that petition, considered with other relevant documents, showed he had satisfied the exhaustion requirement.

4. The Magistrate's Report and Recommendation that the writ be denied was filed on April 2, 1987. The report, which made reference to the counseled petition for allocatur but did not mention the pro se petition, stated that Peoples had not exhausted state remedies. In particular, the Magistrate referred to several claims that were missing from the counseled petition for allocatur as the basis for finding a lack of exhaustion. The parties are in dispute as to whether these claims are sufficiently raised in the pro se petition which the Magistrate did not consider.

5. The District Court approved and adopted the Magistrate's report and recommendation and denied the writ on April 17, 1987, three days before People's deadline for filing objections to the report. Peoples timely filed his objections on April 20. The court filed a new order the following day which denied the objections to the Magistrate's report and again denied the petition for writ of habeas corpus. Peoples filed a petition for certificate of probable cause to appeal to this court on April 28, 1987. This court granted the request on June 3, 1987. We will now reverse based upon our recent decision in *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir. 1987). In *Chaussard,* this court found that a prisoner had satisfied the exhaustion requirement by filing a pro se petition for allocatur in the Supreme Court.



## II. DISCUSSION

6. Peoples raises two claims on appeal. He first claims that he has sufficiently exhausted state court remedies for purposes of the federal habeas corpus statute, 28 U.S.C. § 2254 (1982). Second, Peoples asserts that if he is found not to have exhausted his state court remedies, his failure should be excused because further resort to the state courts would be futile.

7. The second issue is easily disposed of. He bases this assertion on the fact that "the inordinate delay which would be required to exhaust those remedies would render those remedies inadequate." Appellant's brief at 38. While it is true that exhaustion is not required where the attempt would be futile, *see* 28 U.S.C. § 2254(b), there is simply no basis for this court to rule as a matter of law that the state courts of Pennsylvania are unable to afford adequate relief because of inordinate delay.

8. Turning to the question of whether all the claims are exhausted, we first note that in this case our review is plenary, *Chaussard,* 816 F.2d at 927. In his current petition for habeas, Peoples asserts that he was denied due process under several theories, each of which has a slightly different procedural history in the state courts:

1. The prosecutor questioned the defendant on unrelated crimes.
2. Defendant's denial for a non-jury trial was denied.
3. Identification procedures were unnecessarily suggestive.

4. Peoples had ineffective assistance of counsel, in that counsel failed to:

   a. file motions to suppress evidence obtained through an illegal arrest, search and seizure; and

   b. object to the admission of unrelated crimes.

Each of these claims must be exhausted in order for the petition to satisfy the requirements of 28 U.S.C. § 2254(b). *See Rose v. Lundy,* 455 U.S. 509 (1982); *Chaussard,* 816 F.2d at 927. The question of whether each has been exhausted is therefore discussed individually below. Before turning to the individual claims, however, there is a preliminary question as to whether the pro se allocatur petition should be included in the procedural history of any claim.

A. The Pro Se Allocatur Petition.

9. A petition for allocatur to the state Supreme Court can suffice to satisfy the exhaustion requirement. *Chaussard, supra.* In this case, as in *Chaussard,* there were two different allocatur petitions: the pro se petition and the counseled one. The difference between this case and *Chaussard* is that, unlike the latter case, the pro se petition in this case was captioned "Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of Counsel." *See* Appendix at 132a-40a. Appellees argue that this petition should not be considered for purposes of exhaustion because it was a request for counsel rather than for relief; as such, it did not give the Supreme Court a fair opportunity to review the substantive claims. Appellees' brief at 10-11.

10. The proper characterization of the pro se petition is a close question on which there seems to be no con-



trolling law. However, it seems that the Supreme Court had just as much discretion to review the merits of the petition here as it did in the *Chaussard* case. To begin with, the petition looks much more like a request for allocatur than a request for counsel: with the exception of the tail-end of the caption and part of the final sentence, the petition is concerned entirely with allocatur. In fact, the relief requested in the petition is for *both* the grant of allocatur and the appointment of counsel. Appendix at 138a. Thus, the closest procedural analogy to the Supreme Court's disposition of the petition would be a dismissal without prejudice: Peoples was granted an order for the appointment of counsel, but was told that his request for allocatur must be refiled within thirty days. While this might have been the most prudential course for the Supreme Court, it was within their discretion to grant relief on the merits. That they chose not to exercise that discretion should not keep Peoples out of federal court.

11. Admittedly, this argument may not fit in very well with the principle of comity which is at the heart of the exhaustion requirement. The Pennsylvania Supreme Court exercised its discretion in such a way as to avoid deciding an issue before it was presented by counsel; once a counseled petition had been filed, it would have been improper to consider the claims raised in the pro se petition but not the counseled one. And yet those choices seem sufficient to allow a federal court to hear the merits of People's petition. It may be argued that this result is inconsistent with the principle of comity, but the course charted out by *Chaussard* compels our decision here. This court's prior decision in *Chaussard* makes it impossible for us now to ignore the pro se allocatur petition in this case.

B. Exhaustion of Specific Claims.

*1. Improper Cross Examination.*

12. This claim was raised in the post-trial motions, in the brief before the Superior Court, and in the pro se petition for allocatur; it was not raised in the counseled petition. Given our holding that the pro se petition is properly considered part of the procedural history of this claim, the exhaustion requirement is satisfied.

*2. Denial of Non-Jury Trial.*

13. This claim was raised in the post-trial motions, but not in the brief before the Superior Court. The claim was resurrected in the pro se petition for allocatur but then left out of the counseled claim. Assuming again that the pro se petition is relevant, the exhaustion requirement may be deemed satisfied under *Chaussard.* Since the Supreme Court gave no indication that it would refuse to hear the non-jury trial claim because of the procedural defect of not raising it before the Superior Court, *Chaussard* would suggest that inclusion of the claim in the petition for allocatur is sufficient. *See Klein v. Harris,* 667 F.2d 274, 284-85 (2d Cir. 1981).

*3. Tainted Identification Procedures.*

14. This had essentially the same procedural history as the first claim about the improper cross-examination, and should be considered exhausted for the same reasons.

*4. Ineffective Assistance of Counsel.*

15. Peoples raised two ineffectiveness claims in his habeas petition. The first stated that he had been denied



effective assistance because his attorney had failed to seek suppression of the fruits of the arrest. Appellant's brief to this court asserts that this claim was made for the first time "in terms of the ineffective assistance of appellate counsel in the counselled Petition" Appellant's brief at 37 (citing Appendix at 41a-42a). This would not support a finding of exhaustion, since a claim that trial counsel was ineffective is not the same as a claim that appellate counsel failed to assert viable theory on appeal. However, a fair reading of the pro se allocatur petition, Appendix at 136a-37a, shows that Peoples did raise the ineffective ss of *trial* counsel in that document. Thus under the reasoning set out above, this claim has been exhausted.

16. The second ineffectiveness claim, that counsel failed to object to admission of unrelated crimes, was raised only in the pro se petition; it was not mentioned in the post-trial motions, the brief before the Superior Court, or the counseled petition. Thus, like all the other claims, the issue of exhaustion turns on whether the pro se petition is a relevant document; since we hold that it is, this claim has been exhausted.

CONCLUSION

17. Because we find that appellant Peoples has satisfied the exhaustion requirement of 28 U.S.C. § 2254, we will reverse the decision of the District Court and remand for a hearing on the merits of the habeas petition.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1247

PEOPLES, MICHAEL,
*Appellant*

v.

FULCOMER, THOMAS, SUPERINTENDENT; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA and THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

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D.C. Civ. No. 86-4458

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SUR PETITION FOR REHEARING

BEFORE: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, and HUNTER, *Circuit Judges.*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT,

/s/ Morton I. Greenberg
Circuit Judge

Dated: Jan 25, 1988.

No. 87-1602

In The
# Supreme Court of the United States
October Term, 1988

RONALD D. CASTILLE, District Attorney of Philadelphia County; THOMAS FULCOMER, Superintendent, Huntingdon State Correctional Institute; and LEROY ZIMMERMAN, Attorney General of Pennsylvania,
*Petitioners,*

v.

MICHAEL PEOPLES,
*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## REPLY BRIEF FOR PETITIONER

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In The

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*Petitioners,*

v.

MICHAEL PEOPLES,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

## REPLY BRIEF FOR PETITIONER

### SUPPLEMENTAL ARGUMENT

**BECAUSE OF RESPONDENT'S NON-COMPLIANCE WITH APPLICABLE STATE PROCEDURES, HIS HABEAS CLAIMS WERE NOT PRESENTED TO THE HIGHEST STATE COURT IN A POSTURE PERMITTING THEIR REVIEW ON THE MERITS.**

Certiorari was granted in this case to consider whether the Third Circuit's mere presentation rule, which was applied instantly, accords with congressional intent embodied in the habeas corpus exhaustion doctrine. Abandoning the reasoning of the Third Circuit panel which

decided this case, the precedent on which it relied, and his own prior arguments, respondent now agrees that the Third Circuit rule conflicts with this Court's precedents and declines to defend it. Instead, he improperly attempts to turn the significant issue here presented into a mere state law question.[1]

Rather than defending the Third Circuit rationale, from which he benefitted, respondent contends before this Court that the grant of a hearing on the merits of his petition was proper, notwithstanding the panel's incorrect reasoning, because, as a matter of state law, he had complied with all state procedures necessary to permit review

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[1]Respondent also incorrectly suggests that the mere presentation rule is not really a matter of Third Circuit law but results from a broad interpretation by petitioner. A reading of *Chaussard v. Fulcomer,* 816 F.2d 925 (3d Cir.), *cert. denied,* 108 S. Ct. 139 (1987), belies this contention, as does the Third Circuit opinion in this case which squarely raises the mere presentation rule for this Court's consideration.

Respondent relies on *O'Halloran v. Ryan,* 835 F.2d 506 (3d Cir. 1987), to support his premise. It, however, was decided before this case, and cogently points out that there exists a clear conflict within the Third Circuit regarding the exhaustion doctrine. *Ross v. Fulcomer,* 610 F. Supp. 560 (E.D. Pa. 1985) and *Moore v. Fulcomer,* 609 F. Supp. 171 (E.D. Pa. 1985), cited in petitioner's principle brief, demonstrate that the mere presentation rule is regularly applied within the Third Circuit. As a result, the panel here, although plainly cognizant of respondent's state court defaults, mechanically ruled that the exhaustion doctrine was satisfied simply because it found that respondent's habeas claims had been presented in some fashion to the state supreme court.



on the merits of his habeas claims by the state's highest court. Respondent's contention is erroneous.[2]

Respondent did not comply with the state requirement that all claims upon which discretionary review is sought be included in a petition for allowance of appeal; not one of his habeas claims was included in his counselled petition for allowance of appeal (*allocatur*). Because of their omission from that document, the habeas claims were not reviewable on the merits, and federal exhaustion requirements were not met.

Apparently respondent believes that his *pro se* petition, requesting the appointment of counsel, was sufficient to present his habeas claims to the highest state court for review on the merits. The state court's treatment of the document, however, demonstrates that, as a matter of state practice, it was not. The *pro se* document merely

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[2]Respondent also incorrectly persists in blending his *Bighum* claim with his claim that he was cross-examined in violation of a state statute. He erroneously refers to these distinct claims as merely characterizations of the same issue.

The claim of a violation under *Commonwealth v. Bighum,* 452 Pa. 554, 307 A.2d 255 (1973), challenges *whether* an accused's prior *crimen falsi* convictions may be used to impeach him at trial. This issue is quite distinct from error based on state statute, 42 Pa. Cons. Stat. Ann. § 5918 (Purdon 1982), which governs *when* the prosecutor is permitted to introduce such impeachment matter, if, under *Bighum,* the prior convictions are admissible. A trial court's ruling permitting the use of *crimen falsi* impeachment might be quite correct under *Bighum,* but reversible error could still occur if the prosecutor introduced the impeachment evidence contrary to § 5918. Indeed, in state court, respondent fully recognized that these were distinct claims when he alleged the *Bighum* claim as one of court error (J.A. 12), but alleged the statutory claim in terms of prior counsel's ineffectiveness for failing to raise it below (J.A. 51-52, 65).

constituted a successful petition for the appointment of counsel. The state supreme court, upon its grant of respondent's request for counsel, permitted him to raise all of his issues in the counselled *allocatur* petition which he was allowed to file. He chose then to raise but two issues, neither of which were contained in his subsequent habeas petition.[3]

Alternatively, respondent argues that, although the state practice was not followed, for purposes of the comity-based federal exhaustion rule the *pro se* document should be deemed sufficient. Specifically, he contends that since no state statute, rule or decisional authority required the state high court to treat his petition as a request for counsel, rather than as a request for discretionary review, the Pennsylvania Supreme Court's treatment of his *pro se* petition should be afforded no deference by the federal

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[3]The Commonwealth, pursuant to the state supreme court's usual practice with respect to requests for counsel by *pro se allocatur* applicants, declined to address the merits of the *pro se* document, pending either disposition of the request for counsel or a court request for a response on the merits (J.A. 60). The state high court granted the request for counsel and permitted the filing of a counselled *allocatur* petition (J.A. 61). When submitted, that petition presented the two issues which counsel evidently considered to have the most promise. Respondent did not disagree with counsel's limitation of the issues or urge review of other claims asserted in the prior *pro se* pleading. Even had respondent so acted, a decision by the state high court not to review that *pro se* filing would have been proper. The determination of which claims to raise on appeal is within the province of appellate counsel's strategic decisions, and, absent a demonstration of appellate counsel's ineffectiveness, his decision controls. *See, e.g., Murray v. Carrier,* 477 U.S. 478 (1986). Under state practice, then, the state high court had but two issues, neither encompassing any of respondent's habeas claims, upon which to consider the grant of discretionary review.



habeas court. Respondent contends, and the Third Circuit found, that, for purposes of federal law, the state court should be presumed to have reviewed the merits of the *pro se* document, even though under state practice that court concededly did not do so. This finding was unwarranted.

The state court's action was premised on basic considerations of the attorney-client relationship, as reflected in the decisions of this Court. The fact that such considerations are not codified in any of the ways listed by respondent has no bearing on the legitimacy of the state court's action or on the propriety of that action as a basis for deference by the federal habeas court. Instantly, the state supreme court's "opportunity" for review was limited to those claims presented in the counselled petition, and the Third Circuit's contrary conclusion must be reversed. Any other result abrogates the judicial prohibition against *sua sponte* consideration of issues not offered by the parties, *see e.g., Picard v. Connor,* 404 U.S. 270, 277 (1971), and ill-serves the interests of comity.

Further, even if the *pro se* petition were to be considered in determining compliance with the exhaustion requirement, respondent's exhaustion argument still fails. Respondent contends that each of his habeas claims was raised, either in the *pro se* or the counselled petition, as a properly layered claim of the ineffectiveness of counsel. He wrongly concludes, however, that, by raising layered claims of ineffectiveness, he thereby satisfied federal exhaustion requirements as to his habeas claims.[4]

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[4]The *pro se* document was somewhat ambiguously drawn and was capable of different interpretations. Reading the docu-

(Continued on following page)

First, as noted in petitioner's principle brief, not all of respondent's habeas claims were properly layered in state court. Specifically, the due process and equal protection violations, based on a denial of respondent's state law right to a bench trial, were not preserved by alleging Superior Court counsel's failure to raise and preserve the claims. Such an allegation was essential since the claims were omitted in respondent's Superior Court appeal (*see* Brief for Petitioner at 13). Similarly, respondent's habeas challenge to trial counsel's ineffectiveness for failing to litigate the second stop of respondent by police and the related seizure of evidence, was not asserted at the first available opportunity, as required by state law, *i.e.*, when new counsel assumed representation at the Superior Court level. The counselled *allocatur* petition did allege Superior Court counsel's ineffectiveness, but only ineffectiveness for not challenging the correctness of the trial court's physical evidence suppression ruling. That claim did not preserve a challenge to trial coun-

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(Continued from previous page)

ment in a light it deemed to be most favorable to respondent, the Third Circuit panel concluded that respondent's habeas claims were substantively alleged therein. Based on that finding, the panel deemed the exhaustion rule satisfied, notwithstanding the procedural defaults that it found had occurred in the lower courts (J.A. 96-97).

Conceding that the exhaustion principle relied upon by the panel is erroneous, respondent now reinterprets the *pro se* document. He does not allege that it substantively raised his habeas claims, but rather alleges that claims not otherwise properly preserved as a matter of state court practice and procedure could be substantively considered because they were raised by layered ineffectiveness claims. As discussed more fully *infra*, respondent's reinterpretation is unavailing and provides no basis for relief.



sel's performance with respect to the suppression hearing (*see* Brief for Petitioner at 14-15).

Even if the ineffectiveness claims had been properly layered, however, their review on the merits by the Pennsylvania Supreme Court was precluded for several reasons. In contending otherwise, respondent relies primarily on *Commonwealth v. Turner*, 469 Pa. 319, 365 A.2d 847 (1976), a case in which the Pennsylvania Supreme Court heard an appeal as of right in a felonious homicide case.[5] The posture of respondent's case was significantly different. He attempted to place claims—as to which there were no substantiating records and as to which there had been no prior rulings on the merits—before the state supreme court by way of a petition for allowance of appeal. Such petitions are granted only when they present issues of general importance that transcend their legal correctness with respect to the particular case on appeal. *See* Pa. R. App. P. 1114. As denials of such petitions are not rulings on the merits of the claims contained therein, *see Commonwealth v. Tarver*, 493 Pa. 320, 331, 426 A.2d 569, 575 (1981), rejection of respondent's *allocatur* petition, raising previously undecided claims, which lacked underlying substantiating records, was legally insignificant for exhaustion purposes. *See Pitchess v. Davis*, 421 U.S. 482 (1975). A ruling on the merits of those claims, however, remains available to respondent by proceeding in the state collateral review forum. Thus, respondent's failure to follow this state procedure to obtain review on the merits of his

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[5]That court no longer has such expansive direct appellate jurisdiction, and is now primarily an *allocatur* court. *Compare* 42 Pa. Cons. Stat. Ann. §§ 721-726 (Purdon 1981), *with* former Pa. Stat. Ann. tit. 17, § 211.202 (Purdon 1978).

claims is fatal to his claim that he exhausted state remedies.

Equally erroneous is respondent's suggestion that the state supreme court's decision not to remand the layered ineffectiveness claims to the trial court for development of a factual record means that the issue was resolved somehow for exhaustion purposes. The effect of the state supreme court's dismissal was to open the state post-conviction remedy to respondent for development of a factual record. State law contemplates use of the collateral remedy for precisely this purpose. *See Commonwealth v. Dancer,* 460 Pa. 95, 100, 331 A.2d 435, 438 (1975) ("claims of the ineffectiveness of counsel may only be raised in PCHA [Post Conviction Hearing Act] proceedings . . . where the petitioner is represented on direct appeal by new counsel, but the grounds upon which the claim of ineffective assistance are based do not appear in the trial record"); *Commonwealth v. Smith,* 321 Pa. Super. 170, 207, 467 A.2d 1307, 1326 (1983) (rehearing granted as to defendants other than Smith) (although the belated raising by counsel of his own ineffectiveness waived the issue for purposes of direct appeal, "we observe that Appellant Smith is not foreclosed from having this claim heard on collateral attack"); *Commonwealth v. Cook,* 230 Pa. Super. 283, 284, 326 A.2d 461 (1974) ("In the absence of clear and irrefutable on-the-record proof that counsel was ineffective, we cannot decide an ineffective assistance of counsel claim on direct appeal. Rather, in such circumstances, we will wait until an evidentiary hearing has been held upon



an appropriate request for relief under the Post Conviction Hearing Act.").[6]

Use of the state collateral review court, rather than the state trial court, for documentation of a litigant's ineffectiveness claim(s), is irrelevant for federal habeas exhaustion purposes. A determination as to which route must be followed, since it involves a matter of state practice and procedure, is an appropriate state court decision. In either case, the litigant has the opportunity to obtain the necessary factual findings and the subsequent lower court judgment would be subject to appellate review. Comity, therefore, requires that federal habeas review here be deferred pending the outcome of state collateral review litigation. *See Duckworth v. Serrano,* 454 U.S. 1 (1981) (circumvention of the exhaustion of remedies doctrine is not permitted unless there is no opportunity for redress in the state court).[7]

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[6]Respondent bottoms his claim in part on *Commonwealth v. Dessus,* 423 Pa. 177, 224 A.2d 188 (1966), although the doctrine of basic and fundamental error on which it relied was expressly rejected by the Pennsylvania Supreme Court in *Commonwealth v. Clair,* 458 Pa. 418, 326 A.2d 272 (1974), and *Commonwealth v. Mitchell,* 464 Pa. 117, 346 A.2d 48 (1975). Moreover, he incorrectly asserts that *Commonwealth v. Cook* has been overruled and cites no authority as support. To the contrary, its disposition is fully contemplated by state law.

[7]The circumstances of this case are entirely distinct from those considered in *Brown v. Allen,* 344 U.S. 443 (1953). There, this Court decided that it is unnecessary to resort to a state's collateral remedy where issues have been decided on direct appeal. Here, because the ineffectiveness claim is raised for the first time in a request for discretionary review, the state fact-finding court has been bypassed. Resort to the state collateral remedy for the omitted factual determinations does not involve the kind of duplicative state review at issue in *Brown.* Thus, it is not governed by that decision.

Nor is the denial of relief compelled on state law grounds alone. Even if the layering of the ineffectiveness claims to the state high court was sufficient under Pennsylvania law for those claims to be reviewed on the merits, and even if respondent had properly layered all of his ineffectiveness claims, he still has not satisfied exhaustion requirements for his habeas claims. Under respondent's reasoning, he has exhausted five particular sixth amendment claims of the ineffectiveness of counsel. These are not, however, the claims which were raised in his federal habeas petition.

In that petition, respondent presented three substantive issues: (1) an alleged violation of a state statute prohibiting cross-examination of a defendant about his prior criminal convictions (J.A. 73); (2) deprivation of respondent's putative right to a non-jury trial (J.A. 74); (3) the admission of suggestive and tainted identification evidence (J.A. 74). Respondent alleged that these constituted violations of his due process and/or equal protection rights. He made no reference to any ineffectiveness of counsel claims or sixth amendment violations which are more difficult to establish. *See Strickland v. Washington,* 466 U.S. 668 (1984.) His two remaining habeas claims referred only to the ineffectiveness of *trial* counsel in failing to seek suppression of certain evidence and failing to object to unrelated crimes evidence (J.A. 74-75). These claims were not properly layered; they did not properly raise any sixth amendment violations as they failed to contain any allegation of appellate counsel's ineffectiveness for not then presenting these claims in state court.

Sixth amendment counsel ineffectiveness and fourteenth amendment due process and/or equal protection



violation are plainly distinct. They employ and involve different amendments, rights, legal principles and case law. Allegation of the same facts in state and federal courts will not satisfy exhaustion requirements where, as here, the theories presented in each forum are distinct. *See, e.g., Picard v. Connor,* 404 U.S. 270 (1971) (although based on the same facts, claimed violation of fifth amendment grand jury requirement neither presented nor exhausted claim of violation of fifth amendment equal protection clause). Nor will the allegation of the same legal theory, but based on different facts, suffice for exhaustion purposes. *See also Pillette v. Foltz,* 824 F.2d 494 (6th Cir. 1987) (no exhaustion when different reasons for ineffectiveness presented in state and federal courts); *Gornick v. Greer,* 819 F.2d 160 (7th Cir. 1987) (same); *Gibson v. Scheidemantel,* 805 F.2d 135 (3d Cir. 1986) (same). Respondent treats his allegations of ineffectiveness in state court as mere verbiage used to skirt around the law on waiver and exhaustion, which may simply be discarded upon reaching federal court. He fails to recognize that, even under his own reasoning, the layered claims of ineffectiveness are the only claims preserved.

To assert as respondent does that a claim of ineffectiveness of counsel grounded in the sixth amendment is the same as a claim concerning the underlying basis of the ineffectiveness claim and grounded in the fourth, fifth, or any other amendment, is to strip the notion of "substantial equivalence" of any meaning.[8] A state court faced

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[8]Equally erroneous is respondent's attempt to convert his sixth amendment claims asserted in state court into the sub-

(Continued on following page)

with an ineffectiveness claim is given the opportunity to grant or deny relief based only on principles of counsel ineffectiveness, not on other constitutional principles surrounding the underlying claim. The presentation of a particular complaint in state court merely as a basis for the ineffectiveness of counsel cannot "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his" particular complaint. *See Anderson v. Harless,* 459 U.S. 4, 6 (1982). Accordingly, it cannot be the basis for finding exhausted the claims upon which respondent sought habeas corpus relief. *See Williams v. Armontrout,* 679 F. Supp. 916, 926 (W.D. Miss. 1988) (claim of ineffectiveness for failure to object to the admission of other crimes evidence does not fairly present the claim that the other crimes evidence was inadmissible).

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(Continued from previous page)

stantial equivalents of the due process claims he asserted in federal court by noting that in raising his sixth amendment claims he argued that he was denied a "fair trial." Contrary to respondent's contention, claims regarding the denial of a fair trial are not synonymous with due process claims and are just as consistent with a sixth amendment claim as with a due process claim. In this Court's seminal case on the sixth amendment right to effective counsel, *Strickland v. Washington,* 466 U.S. 668 (1984), the Court defined prejudice from an ineffective attorney as arising from "errors so serious as to deprive defendant of a *fair trial,* a trial whose result is not reliable." *Id.* at 687 (emphasis added). Allegations regarding the denial of a fair trial are as likely to be made in claims of trial error grounded in the fourth amendment or sixth amendment as they are in claims grounded in the due process clause of the fifth amendment. Any claim that a serious error was made at trial necessarily includes a claim that the trial was somehow not fair.



## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's principle brief, it is respectfully requested that the order of the United States Court of Appeals for the Third Circuit be reversed and that the case be remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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## STATEMENT OF THE CASE

### A. Procedural History In The Courts Below

This case was initiated when Respondent Michael Peoples (hereinafter "Peoples"), a prisoner serving a state court-imposed term of 15 to 30 years at the Pennsylvania State Correctional Center at Huntingdon upon his conviction for robbery, arson and aggravated assault, filed on July 28, 1986 a *pro se* Petition for a Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (J.A. at 2, 70). In his habeas petition, filed in the United States District Court for the Eastern District of Pennsylvania, Mr. Peoples made the following claims in support of his prayer for relief:

1. that he was improperly impeached with two prior robbery convictions and a theft conviction, in violation of his Fourteenth Amendment due process rights (J.A. at 73);[1]

2. that he was improperly deprived of a right to a non-jury trial, in violation of his due process rights and his rights under the equal protection clause of the Fourteenth Amendment (J.A. at 74);

3. that suggestive pre-trial identification procedures were used, in violation of his Fourteenth Amendment due process rights (*Id.* ); and

4. that he was denied effective assistance of counsel, as guaranteed by the Sixth Amendment, based upon his trial counsel's failure to move to suppress the fruits of an illegal arrest and counsel's failure to object to the admission of evidence of unrelated criminal conduct (specifi-

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[1] Mr. Peoples also alleged a violation of a state statute (now codified at 42 Pa. C.S. § 5918) regulating the use of convictions in cross-examination (J.A. at 73).

cally, an alleged contempt of court based on the allegation that Mr. Peoples changed his hair style shortly before a scheduled line-up) (*Id.*).

The matter was referred to United States Magistrate Edwin E. Naythons who directed that a response be filed and that the state trial court record be delivered to the clerk of the court (J.A. at 3; App. at 173a). The Philadelphia District Attorney filed a response on September 30, 1986, contending that Mr. Peoples had not exhausted his state remedies and, in the alternative, addressing the merits of Mr. Peoples' claims (J.A. at 3).

On October 20, 1986, Mr. Peoples filed a *pro se* reply to the Commonwealth's response, entitled "Petitioner's Traverse to Respondents [sic] Answer," contending that he had exhausted his state remedies and, in the alternative, that state remedies were inadequate to protect his rights because of the history of undue delay in state court adjudication of his claims (J.A. at 3; App. at 63a). He pointed out that both the Superior Court and the Supreme Court of Pennsylvania had been given an opportunity to address his claims, and that he had filed both a "counseled" (*see* J.A. at 64) and a *pro se* Petition for Allowance of Appeal in the Supreme Court of Pennsylvania (*see* J.A. at 49).[2] When the *pro se* Petition is considered, he argued, it is clear that he exhausted his state remedies.

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[2] A Petition for Allowance of Appeal, akin to Petition for Writ of Certiorari in this Court, constitutes a request that the Supreme Court of Pennsylvania exercise its discretionary authority and consider the merits of the appeal. *See* 42 Pa.C.S. § 724(a) (establishing discretionary jurisdiction); Pa. R. App. Pro. 1111 *et seq.* (setting out requirements for petition).



On April 3, 1987, Magistrate Naythons filed a Report and Recommendation in which he concluded that Mr. Peoples failed to exhaust his state remedies, and recommended that the petition be denied without prejudice (J.A. at 3, 77). The Report and Recommendation did not discuss or address Mr. Peoples' *pro se* Petition for Allowance of Appeal, but discussed only the "counseled" petition (J.A. at 78).

On April 17, 1987, five days before the date by which Mr. Peoples was statutorily required to file his objections to the Magistrate's Report and Recommendation,[3] the Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania entered an order approving and adopting Magistrate Naythons' Report and Recommendation, denying and dismissing the Petition for failure to exhaust state remedies, denying a request for state court transcripts, and finding no probable cause for appeal (J.A. at 4, 84).

On April 20, 1987, three days after the entry of the order of Judge Katz denying and dismissing the Petition,

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[3] Under the applicable provision of the Magistrate's Act, Mr. Peoples was required to file any written objections to the Report and Recommendation within ten days of service of the Report and Recommendation. 28 U.S.C. § 636(b)(1); Rule 8(b)(3) of the Rules Governing Section 2254 Cases in the United States District Courts. Under Rules 6(a) and (e) of the Federal Rules of Civil Procedure, weekends are excluded and three additional days are added since service was made on Mr. Peoples by mail. Thus, his objections were required to be filed on or before April 22, 1987.

Even if the additional three days allowed when service is by mail, under Rule 6(e), is not considered to be subject to the Rule 6(a) weekend exclusion, Mr. Peoples' *pro se* objections to the Magistrate's Report and Recommendation were still filed in a timely fashion, and Judge Katz's April 17, 1987 Order was entered before the deadline (*i.e.* April 20, 1987).

Mr. Peoples filed a timely *pro se* document entitled "Objections to Magistrate Report/Recommendation" (J.A. at 4, 86). (*See also* footnote 2, *supra*, for calculation of the date for filing objections to Report and Recommendation.) In his *pro se* objections, Mr. Peoples contended that he had exhausted his state remedies by alleging, *inter alia*, the ineffective assistance of counsel in the Superior Court and the Supreme Court of Pennsylvania, and by raising these claims at the earliest opportunity and in conformity with state procedure (J.A. at 86-87). (*See* discussion of state procedure at pages 23 through 31, *infra*.)[4] Thus, he argued, the Report and Recommendation should not be approved to the extent the Magistrate found that Mr. Peoples had failed to exhaust his remedies (*Id.*).

Two days after the objections were filed, Judge Katz entered an order similar to the earlier order of April 17 dismissing the petition for failure to exhaust, adding only that the objections to the Report and Recommendation were denied (J.A. at 4, 89).

On April 28, 1987, Mr. Peoples filed a timely notice of appeal, purporting to initiate an appeal from the order of April 17,[5] and requesting the issuance of a certificate of probable cause and the appointment of counsel (J.A. at 5; App. at 81a).

On June 3, 1987, the Honorable Collins J. Seitz of the United States Court of Appeals for the Third Circuit

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[4] Mr. Peoples also made arguments on the merits of his claims, rephrasing the claims in certain respects.

[5] That the notice of appeal referenced the "earlier" final order constitutes harmless error. *Forman* v. *Davis*, 371 U.S. 178 (1962). Thus, the court of appeals had jurisdiction. *Id.*



granted the request for a certificate of probable cause (J.A. at 8) and the undersigned was appointed to represent Mr. Peoples.

Following briefing and oral argument, the Third Circuit addressed the exhaustion issue in an unpublished per curiam opinion, reversing the dismissal of the habeas petition on exhaustion grounds and remanding for consideration of the merits of the habeas claims (J.A. at 90-97).

A timely Petition for a Writ of Certiorari was filed by the Commonwealth, and was granted by this Court.

### B. Factual History

The relevant factual history consists of the procedural record in the courts of the Commonwealth of Pennsylvania as to Mr. Peoples' conviction and appeal, and a comparison of the manner in which various claims were made in the state courts with the claims of constitutional deprivations made in the *pro se* Petition for Writ of Habeas Corpus.

Mr. Peoples was convicted by a jury before the Honorable James T. McDermott of the Philadelphia Court of Common Pleas on January 16, 1981 (J.A. at 14). In his Post Verdict Motions, Mr. Peoples' trial counsel, Harvey S. Booker, Esquire, raised the following grounds in support of Mr. Peoples' request for post verdict relief:

1. Prosecutorial misconduct based on prejudicial speeches to the jury.

2. The identification of Mr. Peoples by James Wright, a prosecution witness, was impermissibly tainted.

3. The line-up scheduled at defendant's request was cancelled.

4. The trial court erred in permitting the impeachment of Mr. Peoples with two prior robbery convictions.
5. The trial court erred in denying Mr. People's request for a non-jury trial.
6. The trial court erred in permitting the cross-examination of the defendant with uncertified notes of prior testimony.
7. The trial court erred in giving an accomplice charge to the jury.

(J.A. at 11-13).

The Honorable Charles P. Mirarchi, Jr.[6] entered an opinion dated June 8, 1982, denying Mr. Peoples' Post Verdict Motions (J.A. at 14).

Mr. Peoples appealed to the Superior Court of Pennsylvania, the intermediate appellate court in Pennsylvania's judicial system. Newly appointed counsel, Vincent T. Snyder, Esquire, filed a brief on January 1, 1983 (J.A. at 26). In his brief, Mr. Snyder made the following arguments:

1. That trial court erred in failing to suppress the identification of Mr. Peoples by James Wright, a prosecution witness, based on tainted identification procedures (J.A. at 27, 29-34).
2. That trial court erred in denying Mr. Peoples' request for a line-up (J.A. at 28, 34).
3. That trial court erred in ruling that Mr. Peoples could be impeached with his prior robbery convictions. (J.A. at 28, 34-47).
4. That trial court erred in giving an accomplice instruction to the jury (J.A. at 28, 37-39).

[6]Judge McDermott had been elected to the Supreme Court of Pennsylvania in the interim and the case was assigned to Judge Mirarchi.



5. That sentences imposed were illegal due to the merger of offenses (J.A. 28, 39-41).
6. That Mr. Peoples was denied the effective assistance of trial counsel, based on the following errors (J.A. at 28, 41-43):
   a. trial counsel failed to attend the scheduled line-up and failed to request a point for charge on the unreliability of identification testimony.
   b. trial counsel failed to prepare adequately in that he failed to interview Mr. Peoples, was unable to locate a helpful witness, and failed to explain to Mr. Peoples his right to a jury and a non-jury trial.
   c. trial counsel was allegedly under the influence of alcohol during trial, refused to abide by Mr. Peoples' wishes as to the use of peremptory strikes, and did not obtain the notes of the suppression hearing prior to trial.
   d. trial counsel failed to challenge properly the sufficiency of the evidence and the legality of the sentences imposed.

The Superior Court affirmed Mr. Peoples' conviction in Memorandum Opinion, Per Curiam Order and Judgment filed on September 16, 1983 (J.A. at 44-48).

On October 14, 1983, Mr. Peoples filed a timely *pro se* request for discretionary review by the Supreme Court of Pennsylvania entitled "Petition for Allowance to File Appeal to Review Errors of Superior Court with Appointment of New Counsel" (J.A. at 49) (hereinafter "*pro se* Petition for Allowance of Appeal").[7]

[7]There were two copies of Mr. Peoples' *pro se* Petition for Allowance of Appeal filed in the district court. Both copies were supplied by Mr. Peoples from his personal files and no copy was

Mr. Peoples raised the following claims in his *pro se* Petition for Allowance of Appeal:

a. That he was denied his right to the effective assistance of counsel during his appeal to the Superior Court in that Vincent Snyder failed to raise claims of error committed by trial counsel as to the following:

(i) in failing to challenge the fact that Judge James T. McDermott, the trial judge, failed to write a timely opinion on Mr. Peoples' post verdict motions (J.A. at 49-51).

(ii) in failing to object to the prosecutor's prejudicial statements in speeches to the jury (J.A. at 51-52).

(iii) in failing to object to evidence that Mr. Peoples had changed his appearance before the scheduled line-up, in violation of a court order (J.A. at 56-57).

(iv) in failing to object to the manner in which the burden of proof was "shifted" to Mr. Peoples as to the issue of identification based upon the evidence of the change in his appearance (J.A. at 55-56).

b. That the trial court and the Superior Court erred as to the admission of Mr. Peoples' prior convictions (J.A. at 53).

c. That the trial court and the Superior Court erred by ruling that Mr. Peoples was not entitled to a non-jury trial (J.A. at 53-54).

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supplied by the state court.

The district court entered an order directing that the clerk of the state trial court provide that court's file to the district court. That file did not include the records of the Superior Court or the Supreme Court of Pennsylvania.



d. That the trial court erred in refusing Mr. Peoples' request for a lineup (J.A. at 54-55).

e. That trial counsel and appellate counsel were ineffective for failing to object to evidence that Mr. Peoples had changed his appearance by cutting his hair after arrest, leading to the cancellation of the line-up (J.A. at 55).

f. That the lower court erred in giving an accomplice charge to the jury (J.A. at 57-58).

In response to the *pro se* Petition for Allowance of Appeal, the Supreme Court of Pennsylvania granted the request for appointment of counsel. The court directed the appointment of counsel "to assist [Mr. Peoples] in filing a petition for allowance of appeal" (J.A. at 61).[8] Thus, the Supreme Court did not rule on the merits of the *pro se* Petition for Allowance of Appeal.

On or about June 1, 1985, Stephen P. Gallagher, Esquire, newly appointed to represent Mr. Peoples, filed a Petition for Allowance of Appeal (hereinafter, "counseled Petition for Allowance of Appeal"), making the following claims of ineffective assistance of trial and appellate counsel (J.A. at 62):

1. The trial court erred in permitting the cross-examination of Mr. Peoples as to his prior convictions (J.A. at 66-67).

2. The trial court erred in refusing Mr. Peoples' motion to suppress physical evidence and a statement obtained as a result of an unlawful arrest (J.A. at 67).

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[8] The Supreme Court of Pennsylvania referred the matter to the trial court for the appointment of counsel.

Mr. Gallagher requested that the Supreme Court of Pennsylvania grant a new trial or, in the alternative, remand the matter for further hearings (J.A. at 68).

Without elaboration, on November 4, 1985, the Supreme Court of Pennsylvania denied the counseled Petition for Allowance of Appeal filed by Mr. Gallagher (J.A. at 69).[9]

## SUMMARY OF ARGUMENT

The Commonwealth contends that the Third Circuit established a "mere presentation" rule which permits exhaustion of habeas claims upon a showing that the claims were placed before the state court, even if in a non-justiciable posture, and that Mr. Peoples' claims were not exhausted because one or more of the claims were defaulted or otherwise non-justiciable when presented to the Supreme Court of Pennsylvania.

An earlier decision of the Third Circuit, *Chaussard* v. *Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S.Ct. 139 (1987), as broadly interpreted by the Commonwealth, may be read to establish a rule permitting mere presentation to the state court of last resort. To the extent that the Third Circuit's opinion may be so read, that court has acted inconsistently with prior decisions of this Court. Those decisions make clear that a "fair opportunity" to review the merits of habeas claims requires presentation in a posture which would permit the state court to reach the merits of the claims, if it determined to do so in the exercise of its discretion.

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[9] The Order of the Supreme Court of Pennsylvania states as follows: "November 4, 1985. Petition Denied." (J.A. at 69).



Here, one or more of Mr. People's claims were not raised at one or more levels of the proceedings in the lower courts of Pennsylvania, and it is on that basis that the Commonwealth contends that the claims were in a non-justiciable posture. However, all of the habeas claims were raised in the Supreme Court of Pennsylvania in either a counseled or *pro se* Petition for Allowance of Appeal, and any failure to raise a claim at an earlier stage of the proceedings was alleged to constitute the ineffective assistance of trial or earlier appellate counsel. Under a well-established and routinely-applied exception to Pennsylvania's default rule, Pennsylvania appellate courts may and regularly do consider the merits of otherwise defaulted claims, where the failure to raise claims at all earlier stages of the proceedings is alleged to be due to the ineffective assistance of counsel. Under this rule, all of Mr. Peoples' claims which were defaulted during any earlier stage of the proceedings before the courts of the Commonwealth of Pennsylvania were nonetheless in a justiciable posture before the Supreme Court of Pennsylvania.

Since all of Mr. Peoples' habeas claims were either raised at all earlier stages, or if not, it was alleged that the failure to so raise them was due to the ineffectiveness of prior counsel, the Supreme Court of Pennsylvania had a fair opportunity to review the merits of the claims. Accordingly, the habeas claims are exhausted.

## ARGUMENT

### The Supreme Court Of Pennsylvania Had A Fair Opportunity To Review The Federal Habeas Claims

Of the questions most often presented in the federal court's adjudication of habeas corpus petitions filed by state prisoners, *see Wainwright* v. *Sykes*, 433 U.S. 72,

78-79 (1977),[10] this case presents the question of to what extent a state prisoner must exhaust his state remedies and, more specifically, by what means are federal courts to evaluate whether a prisoner's alleged failure to comply with state appellate procedure deprived the state court of last resort of a "fair opportunity" to review the claims. The Commonwealth contends first, that the Third Circuit has established an incorrect rule by which mere token presentation of the habeas claims to the state court, even if in a non-justiciable posture, constitutes a fair opportunity for state court review; and second, that Mr. Peoples' claims were in a non-justiciable posture in the Supreme Court of Pennsylvania. Thus, the Commonwealth argues, analyzed in terms of the appropriate standard, one or more of Mr. Peoples' claims are unexhausted and his habeas petition should be dismissed.[11]

Mr. Peoples' position may be stated simply. As broadly read by the Commonwealth, the Third Circuit's holding in an earlier decision (*Chaussard* v. *Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S.Ct. 139 (1987)), which was relied upon by the Third Circuit panel in this case, may well be inconsistent with the precedent of this Court. Mr. Peoples does not rely upon any "mere presentation" rule and thus does not defend the Commonwealth's broad interpretation of *Chaussard*. Rather, as a matter of Pennsylvania procedure, Mr. Peoples' claims were in a posture

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[10] *Wainwright* v. *Sykes* posited that four questions are most often raised in federal habeas litigation: 1) what types of claims may be considered? 2) to what extent must the federal court defer to state court resolutions? 3) to what extent must state remedies be exhausted? 4) in what instances will an independent state ground bar consideration of otherwise cognizable claims? 433 U.S. at 78-79.

[11] *See Rose* v. *Lundy*, 455 U.S. 509 (1982) (all claims in a petition must be exhausted).



in which they could have been reviewed in a routine fashion and in the ordinary course of proceedings by the Supreme Court of Pennsylvania. Thus, the claims were properly presented to that court and are exhausted in accordance with the well-established precedent of this Court.

### I. Discussion Of Exhaustion Requirement

#### A. General Principles

This Court has examined the exhaustion requirement several times during the last century, beginning with *Ex parte Royall*, 117 U.S. 241 (1886), and although "this line of authority has not been without uncertainties and changes in direction on the part of the Court," *Wainwright* v. *Sykes*, 433 U.S. at 81, the comity-based underpinnings of the exhaustion requirement have been consistently recognized. *See, e.g., Ex parte Royall*, 117 U.S. 241, 251 (the exhaustion rule is based upon a "recognition of the fact that the public good requires [that relations between federal and state courts] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution"); *Picard* v. *Connor*, 404 U.S. 270, 275-76 (1971) (quoting *Ex parte Royall); Rose* v. *Lundy*, 455 U.S. 509 (1982) (quoting *Ex parte Royall;* the Court examines policy underpinnings for rule).

This Court has had occasion to examine specifically the required mode of presentation to the state court of last resort on at least three occasions. In *Ex parte Hawk*, 321 U.S. 114, 116 (1944), the Court held that presentation of claims in the form of an application for an extraordinary writ did not constitute a fair opportunity to address the claims. The holding in *Ex parte Hawk* was reaffirmed in *Pitchess* v. *Davis*, 421 U.S. 482 (1975), another extraordi-

nary writ case. There, the Court focused upon the extremely restricted extent of the state supreme court's jurisdiction in the issuance of the writ, which jurisdiction was limited to "questions of first impression and general importance." *Id.* at 488 (quoting *People* v. *Medina*, 6 Cal.3d 484, 491, 492 P.2d 686, 690 (1972) (en banc)). Because of this severely limited jurisdiction, the state court of last resort would be barred from reviewing the claims unless it also found that the issues were novel and of public importance. Thus, the claims were not exhausted.

Finally, this Court's most recent comprehensive discussion on the question of the required mode of presentation to the state court was *Picard* v. *Connor*, 404 U.S. 270 (1971). There, the Court held that the comity-based underpinnings of the exhaustion rule required not only that the factual predicate for the habeas claims be presented to the state court, but also that the state court be presented with the federal constitutional theory upon which the claim was grounded. *Id.* at 276-78. The Court reasoned that "[i]f the exhaustion doctrine is to prevent 'unnecessary conflict between the courts equally bound to guard and protect rights served by the Constitution,'" there must be a fair presentation of the claim in the state court. *Id.* at 275-76 (quoting *Ex parte Royall*, 117 U.S. at 251).

Read together, these cases establish the principle that a habeas claim has been exhausted if the claim has been presented to the state court in terms of the same legal and factual grounds as in the habeas petition, and in a posture in which the state court may reasonably address the merits of the claim.



**B. Identification Of Federal Constitutional Theories To State Court**

A related matter concerns the specificity with which a prisoner must identify the federal constitutional underpinnings of the claims in the state courts. This Court considered this aspect of the exhaustion rule in *Picard* v. *Connor*, 404 U.S. 270, a case in which the prisoner claimed in the state courts that the indictment against him was invalid, but contended in the habeas court that he had been denied equal protection under the Fourteenth Amendment. This Court held that the two claims were so different that the state courts had not been given a fair opportunity to address the latter claim. *Id.* at 274-77. However, the Court recognized that "there are instances in which 'the ultimate question for disposition' will be the same despite variations in the legal theory or factual allegations urged in its support." *Id.* at 277 (quoting *United States ex rel. Kemp* v. *Pate*, 359 F.2d 749, 751 (7th Cir. 1966)). Although the Court found that a different legal theory had been advanced in the state courts, it was careful to point out that strict standards of pleading will not be enforced:

> [W]e do not imply that respondent could have raised the equal protection claim only by citing "*book and verse on the federal constitution.*" We simply hold that *the substance* of a federal habeas corpus claim must first be presented to the state courts. The claim that an indictment is invalid is not the *substantial equivalent* of a claim that it results in an unconstitutional discrimination.

*Id.* at 278 (citations omitted) (emphasis added).

Following *Picard*, the Courts of Appeals have fleshed out *Picard's* functional or "substantial equivalency" and have reached a consensus as to the means by which the

question may be addressed. For example, the Third Circuit has stated that the "method of analysis" asserted in the habeas court must be such that the state court had notice of the nature of the federal right that the petitioner contends was violated. *Bisaccia* v. *Attorney General of New Jersey*, 623 F.2d 307, 310 (3d Cir. 1980).[12] The habeas court may, of course, find exhaustion when briefs and opinions in the state court record include citations to specific constitutional provisions. *Daye* v. *Attorney General of New York*, 696 F.2d 186, 192 (2d Cir. 1982) (en banc). However, there are a number of other ways that a prisoner may alert the state court to the nature of his federal constitutional claim. *Id.* at 192-94.

Reliance in the state court upon specific federal constitutional decisions provides notice of the underlying nature of the claim. *See Brown* v. *Cuyler*, 669 F.2d 155, 159 (3d Cir. 1982). Similarly, a prisoner's claim that he was deprived of a federally guaranteed right, without a specific constitutional or decisional citation, may be sufficient. *See Twitty* v. *Smith*, 614 F.2d 325, 332 (2d Cir. 1979). Of course, the more specific the description of the alleged violation, the more easily the state court will be alerted to the nature of the claim. *Daye* v. *Attorney General of New York*, 696 F.2d at 193.

Under the appropriate circumstances, a claim that a petitioner has been denied a "fair trial" will be sufficient to alert the state court to a claim of a denial of the petitioner's federal due process rights. *Bisaccia* v. *Attorney General*

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[12] In order to determine whether the state courts were presented with the "substantial equivalent" of the claims made in the federal habeas petition, the habeas court should examine the pretrial, trial and appellate briefs submitted to the state court. *Picard* v. *Connor*, 404 U.S. at 273-74.



*of New Jersey*, 623 F.2d at 310. The concept of "fairness" comprises a broad spectrum of procedural rights and protections, some of which are of statutory or decisional origin, while others are based on a variety of constitutional provisions, including the due process clause. In order to determine whether the claimed deprivation of a "fair trial" was sufficient to alert the state court to a claimed violation of the due process clause, the federal habeas court must look to the nature of the facts and the analysis underlying the claim.

In *Bisaccia* v. *Attorney General of New Jersey*, the Third Circuit held that the appropriate inquiry is whether "the 'method of analysis' asserted in the federal courts was readily available to the state court." 623 F.2d at 310 (quoting *Zicarelli* v. *Gray*, 543 F.2d 466, 472 (3d Cir. 1976)). This approach focuses on the facts of the case and on whether a method of analysis consistent with the federal constitutional considerations was apparent in state court. *Bisaccia* v. *Attorney General of New Jersey*, 623 F.2d at 311. In *Bisaccia*, the petitioner contended in his federal habeas petition that he had been denied his federal due process rights based on the admission of evidence of a guilty plea by a testifying conspirator. The New Jersey Supreme Court had examined the issue by "pursu[ing] a method of analysis consistent with Fourteenth Amendment due process determinations." *Id.* at 311. The claim was thus exhausted.

A similar approach was established by the Second Circuit in *Daye* v. *Attorney General of New York*, a case in which the petitioner contended in his federal habeas petition that he was denied his federal due process rights because of the bias of the trial judge. 969 F.2d at 188-189. Although he had claimed a deprivation of a "fair trial" on the same facts in the state courts, the Second Circuit

found the "factual matrix" underlying the claim to be "well within the mainstream of due process adjudication." *Id.* at 193 (quoting *Johnson* v. *Metz*, 609 F.2d 1052, 1057 (2d Cir. 1979) (Newman, J., concurring)).

The "substantial equivalency" standard established by this Court in *Picard* has resulted in a practical standard by which the lower courts may consider the issue in a consistent and fair manner.

### C. The Third Circuit's Decisions In *Chaussard* v. *Fulcomer* And In This Case

In *Chaussard* v. *Fulcomer*, 816 F.2d 925 (3d Cir.), *cert. denied*, 108 S.Ct. 189 (1987),[13] the prosecution contended that of four closely related habeas claims, two had not been raised in the Pennsylvania Superior Court, although all four were apparently raised in the Supreme Court of Pennsylvania. Whether, in fact, the two claims had been defaulted in the Pennsylvania Superior Court is not addressed in *Chaussard*. The default is only referred to in the court's description of the prosecution's contentions. The prosecution argued that the Supreme Court of Pennsylvania did not have a "realistic opportunity" to address the two defaulted claims because claims not raised at all earlier stages of the proceedings are deemed waived and are non-justiciable before the Supreme Court of Pennsylvania. *Id.* at 928. Although the Third Circuit discussed several related exhaustion issues, it did not discuss the contention that the default in the Superior Court precluded review by the Supreme Court of Pennsylvania and

[13] The Third Circuit in *Chaussard* held the habeas claims to be exhausted but ruled against the prisoner on the merits. The prisoner sought review before this Court on the merits of his claims but his Petition for a Writ of Certiorari was denied.



simply stated that the prisoner had "satisfied the exhaustion requirement." *Id.* at 928.[14]

The Commonwealth argues that *Chaussard* stands for the proposition that defaulted claims merely presented to the state court of last resort are nonetheless exhausted. The Commonwealth posits this broad interpretation of *Chaussard*, which it labels a "mere presentation" rule, as the principal issue before this Court and asks this Court to hold that this interpretation is not consistent with precedent and policy. If this "mere presentation" rule is not valid, the Commonwealth argues, it should prevail in this case.

The Commonwealth's broad interpretation of *Chaussard* will not be defended by Mr. Peoples, although reasonable minds may differ as to whether the Third Circuit held that defaulted claims are nonetheless exhausted. As is demonstrated below, Mr. Peoples should prevail because, although the state record is not tidy, all habeas claims were fairly presented to the Supreme Court of Pennsylvania.

The Third Circuit's record on the issue is made clear by its post-*Chaussard* decision in *O'Halloran* v. *Ryan*, 835 F.2d 506 (3d Cir. 1987). In *O'Halloran*, a claim arguably defaulted in the trial court was raised in the Superior Court of Pennsylvania in terms of ineffective assistance of counsel and the Supreme Court of Pennsylvania denied discretionary review. On habeas review, the Third Circuit found the claims to be unexhausted. If the *O'Halloran* panel had shared the Commonwealth's broad reading of

[14] Based upon a review of the record in *Chaussard*, undersigned counsel informed the Third Circuit at oral argument that at least one of the claims appeared to have been defaulted.

*Chaussard*, the claims would have been held to be exhausted because they were, even if earlier defaulted, "presented" to the Supreme Court of Pennsylvania in a petition for discretionary review.

The prisoner in *O'Halloran* argued, as does Mr. Peoples, that his claims were justiciable on direct appeal to the Supreme Court of Pennsylvania because the defaults were the result of the ineffectiveness of prior counsel. However, relying upon the same outdated and overruled Superior Court precedent as that cited by the Commonwealth in this appeal, *Commonwealth* v. *Cook*, 230 Pa. Super. 283, 320 A.2d 461 (1974), the Third Circuit held that the lack of a record in the state appellate courts precluded review on that appeal. Thus the *O'Halloran* court ruled the prisoner would be required to seek collateral review under the Pennsylvania Post Conviction Hearing Act. 835 F.2d at 509-510.

While *O'Halloran* demonstrates that the Third Circuit did not adopt a "mere presentation" rule in *Chaussard*, it also reflects the same incorrect and outdated view of Pennsylvania law as that advanced by the Commonwealth in this case.

## II. Applicable Procedural Rules Of The Commonwealth Of Pennsylvania

### A. Ineffectiveness Of Control Exception To The Pennsylvania Default Rule

It is important to recognize the difference between the manner in which the federal courts and the courts of Pennsylvania may review newly raised claims on direct appeal. In general, in both the federal and the Pennsylvania court systems, an appellate court will not review a claim raised for the first time on appeal or defaulted at an earlier stage of the proceedings. *See, e.g., United States*



v. *Schreiber*, 599 F.2d 534, 538 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979). Pennsylvania vigorously applies a waiver rule to the preservation of claims for appellate review. *See, e.g., Commonwealth* v. *Holmes*, 315 Pa. Super. 256, 461 A.2d 1268 (1983)(post trial motion alleging insufficient evidence preserves no claim; even a claim of insufficiency of evidence is waived); *Commonwealth* v. *Gravely*, 486 Pa. 194, 404 A.2d 1296 (1979) (claims must be in the post trial motion itself; claims made in the brief supporting the motion are deemed waived).

Consistent with the strict enforcement of this waiver policy is Pennsylvania's rule that claims that prior counsel was ineffective are deemed waived if they are not raised at the earliest stage of the proceedings at which the allegedly ineffective attorney no longer represents the defendant. Thus, Pennsylvania courts will invoke this rule to deny review, even on collateral attack, of ineffectiveness claims not raised at the earliest stage at which the allegedly ineffective lawyer no longer represented the defendant. *See Commonwealth* v. *Strachan*, 460 Pa. 407, 333 A.2d 790 (1975); *Commonwealth* v. *Dancer*, 460 Pa. 95, 331 A.2d 435 (1975); *Commonwealth* v. *Smallwood*, 465 Pa. 392, 350 A.2d 822 (1976); *Commonwealth* v. *Seachrist*, 478 Pa. 621, 387 A.2d 661 (1978); *Commonwealth* v. *Wallace*, 495 Pa. 295, 433 A.2d 856 (1981).

This line of decisions finding waiver of ineffectiveness claims when they are raised by new counsel on direct appeal is onerous and, at times, harsh. However, there is, as a consequence of this waiver rule, a means by which a claim may be raised, even if earlier defaulted, where the failure to raise and/or preserve the claim is alleged to be due to the ineffectiveness of prior counsel. If the Pennsylvania courts will deem a defendant to have waived ineffectiveness claims when the claims are not raised buy new

counsel, it follows that ineffectiveness claims, if they are raised on direct appeal, are justiciable. That is, since the claims must either be raised or be deemed waived, the appellate courts of the Commonwealth of Pennsylvania have jurisdiction to review the newly raised claims on direct appeal. *See Commonwealth* v. *Carter*, 463 Pa. 310, 344 A.2d 846 (1975); *Commonwealth* v. *Hubbard*, 472 Pa. 259, 276-77 n.6, 372 A.2d 687, 695 n.6 (1977).

There are at least four rationales in Pennsylvania case law for the review of ineffectiveness claims raised on direct appeal for the first time.

First, in *Commonwealth* v. *Dessus*, 423 Pa. 177, 224 A.2d 188 (1966), the Supreme Court of Pennsylvania reiterated its general rule that claims will not be considered for the first time an appeal, but recognized a general exception "where public policy or the interests of justice require a consideration and determination" of the issue. 423 Pa. at 178, 224 A.2d at 193. In *Commonwealth* v. *Faison*, 437 Pa. 432, 264 A.2d 394 (1970), in express reliance upon the public policy exception to the waiver rule articulated in *Dessus*, the Supreme Court of Pennsylvania expressly held, apparently for the first time, that defaulted ineffectiveness claims could be raised on appeal for the first time:

> To require appellant to raise this issue below, i.e. to require appellant's trial counsel to challenge his own competence at trial or in post-trial motions, would clearly be pointless. Where an appellant is represented in the appeal *nunc pro tunc* by counsel other than the trial counsel and an issue of competent counsel arguably appears in the record, the considerations set forth in *Commonwealth* v. *Dessus*, *supra*, dictate that such an issue should be considered.

437 Pa. at 443, 264 A.2d at 400.



Second, in *Commonwealth* v. *Faison*, and in *Commonwealth* v. *Carter*, the Supreme Court of Pennsylvania reasoned that it would be unrealistic, pointless, as well as demeaning to counsel, to expect counsel to raise his or her own ineffectiveness as a claim. 463 Pa. at 314, 344 A.2d at 848. *See also Commonwealth* v. *Smith*, 494 Pa. 294, 433 A.2d 1349 (1981).[15]

Third, if a failure to raise the claim as soon as the allegedly ineffective counsel no longer represents the defendant will be deemed a waiver, it logically follows that the claim, if raised, is justiciable. *Commonwealth* v. *Hubbard*, 472 Pa. at 276-77 n.6, 372 A.2d at 695 n.6.

Fourth, judicial economy is advanced if the appellate court, often while considering otherwise non-defaulted claims, can simultaneously address ineffectiveness claims. This rationale is illustrated most pointedly in the Pennsylvania cases which permit an attorney to raise his or her own ineffectiveness for the first time on appeal if the error is apparent on the record. *See Commonwealth* v. *Fox*, 476 Pa. 475, 383 A.2d 199 (1978); *Commonwealth* v. *Serianni*, 337 Pa. Super. 309, 313, 486 A.2d 1349, 1351 (1984). Despite judicial statements that it would be unseemly and demeaning to require counsel to argue his or her own ineffectiveness, "judicial economy is promoted since the appeal may be disposed of without the further procedural steps required for appointment of new counsel." *Commonwealth* v. *Glaze*, 366 Pa. Super. 517, 521, 531 A.2d 796, 798 (1987).

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[15] Nonetheless, the Pennsylvania courts will even permit a lawyer to raise his or her own ineffectiveness as a new claim on direct appeal if the error is apparent on the record. *Commonwealth* v. *Fox*, 476 Pa. 475, 383 A.2d 199 (1978).

Where ineffectiveness claims are raised in the Pennsylvania appellate courts for the first time on direct appeal, the Supreme Court of Pennsylvania has recognized that the appellate court has three choices for the resolution of the claims:

> The problem in this case, as in most cases where the claim of ineffective assistance of counsel is raised on direct appeal, is that we have before us no record of any hearing at which is delineated trial counsel's reasons for taking the steps later challenged. Where the record on appeal clearly shows that there could have been no reasonable basis for a damaging decision or omission by trial counsel, then of course, the judgment must be vacated and appropriate relief, such as allowing the filing of post trial motions or the ordering of a new trial, granted. Where, on the other hand, it is impossible to tell from the record whether or not the action of trial counsel could have had a rational basis, the appellate court will vacate the judgment, at least for the time being, and remand for an evidentiary hearing at which trial counsel may state his reasons for having chosen the course of action taken. Neither of these remedies, however is appropriate if on the record it is apparent that the actions claimed to constitute ineffectiveness were in fact within the realm of trial tactics or strategy. A finding of ineffectiveness of counsel cannot be made "unless we con[clude] that the alternatives not chosen offered a potential for success substantially greater than the tactics actually utilized."

*Commonwealth* v. *Turner*, 469 Pa. 319, 324, 365 A.2d 847, 849 (1977) (ineffectiveness claims raised an direct appeal; court addresses merits and affirms convictions)(footnotes and citations omitted).

Where the claim is made that trial or earlier appellate counsel has been ineffective and the Supreme Court or Superior Court of Pennsylvania can evaluate the claim on



the basis of the existing record, the courts can address the merits of the claim and affirm the conviction. *See Commonwealth* v. *Carter*, 463 Pa. 310, 344 A.2d 846; *Commonwealth* v. *Turner*, 469 Pa. 319, 365 A.2d 847; *Commonwealth* v. *Johnson*, 479 Pa. 60, 387 A.2d 834 (1978)(court affirms conviction, reaching the merits of an ineffectiveness claim); *Commonwealth* v. *Tessel*, 347 Pa. Super. 37, 53, 500 A.2d 144, 152 (1985) (new counsel raises ineffectiveness claim for the first time on appeal; affirming on the merits, the court states, "[t]he claim is . . . properly before us").

Where the merits of the ineffectiveness claim, raised for the first time on appeal, are not apparent from the record, the Pennsylvania appellate courts can remand the case to the trial court for the purpose of a hearing on the merits. *See Commonwealth* v. *Murphy*, 316 Pa. Super. 178, 182, 462 A.2d 853, 855 (1983)(remand to Court of Common Pleas for hearing and a decision); *Commonwealth* v. *Jellots*, 277 Pa. Super. 358, 363, 419 A.2d 1184, 1187 (1980)(same). There is no requirement that a collateral attack be mounted under the Post Conviction Hearing Act.

The case of *Commonwealth* v. *Hubbard*, 472 Pa. 259, 372 A.2d 687 (1977), *appeal after remand*, 485 Pa. 353, 402 A.2d 999 (1979), is instructive and demonstrates the manner in which the Supreme Court of Pennsylvania routinely reviews claims such as those asserted by Mr. Peoples. Hubbard was convicted of murder in the Court of Common Pleas and on direct appeal contended that post-trial counsel[16] was ineffective because in the post verdict

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[16] Hubbard was represented at trial and for the purpose of post verdict motions by retained counsel (trial counsel), a public defender who filed supplemental post verdict motions (post-trial counsel), and on direct appeal by another public defender (appellate counsel).

motions he failed to raise a claim of ineffective assistance of trial counsel based on the latter's failure to object to certain prejudicial statements made in the prosecutor's closing. After finding the contention to be of "arguable merit," the Supreme Court vacated the judgment of sentence and remanded the case for an evidentiary hearing. 485 Pa. at 356, 402 A.2d 1000. Upon completion of the hearing and entry of an adjudication by the trial court, the matter was placed directly before the Pennsylvania Supreme Court, which affirmed the conviction. 485 Pa. at 358, 402 A.2d at 1000-01.

Finally, when the merits of a claim of ineffective assistance of counsel are susceptible to review on direct appeal, the Supreme Court can address the merits and reverse the judgment of sentence. *See Commonwealth* v. *Morin*, 477 Pa. 80, 383 A.2d 832 (1978). In *Morin*, the defendant's first counsel failed to raise the issue of the defendant's waiver of a jury trial in post verdict motions and before the Superior Court. New counsel raised the issue in terms of ineffective assistance of counsel before the Supreme Court of Pennsylvania, claiming the failure to raise the claim was due to earlier counsel's ineffectiveness. Rejecting the prosecution's argument that the case should be remanded for a hearing on the matter, the Supreme Court of Pennsylvania addressed the merits of the claim, reversed the judgment of sentence and remanded the case for a new trial. 477 Pa. at 88, 383 A.2d at 835.

Similarly, in *Commonwealth* v. *Fassett*, 496 Pa. 529, 437 A.2d 1166 (1981), the defendant was represented by new counsel in the Supreme Court of Pennsylvania and raised for the first time the contention that trial counsel was ineffective for failing to move for the suppression of the fruits of a vehicle stop. The failure of prior counsel to raise and preserve the issue was alleged to be due to



earlier counsel's ineffectiveness. With a citation to *Commonwealth* v. *Hubbard*, the Supreme Court stated that the matter was properly before it and, finding earlier counsel ineffective, reversed and remanded for a new trial. 496 Pa. at 532 n.2, 534, 437 A.2d at 1168 n.2, 1169.

This Court need go no further than the record in this case to understand the application of the ineffectiveness exception to the waiver rule. Mr. Peoples was represented by new counsel in the Superior Court and new counsel argued, for the first time, that trial counsel was ineffective in several specifics (J.A. at 27, 39-43). In its Memorandum Opinion, the Superior Court noted that since new counsel had been appointed, the claims were "reviewable even though they had not been previously raised." (J.A. at 47). Accordingly, the court addressed the merits of the claims (*Id.* ).

### B. The Commonwealth's Arguments

The Commonwealth makes several arguments concerning Pennsylvania law which are incorrect. First, citing a 1974 Superior Court case, *Commonwealth* v. *Cook*, 230 Pa. Super. 283, 320 A.2d 461 (1974), and ignoring the above-cited cases from the Supreme Court Pennsylvania, the Commonwealth argues that a claim of ineffectiveness of prior counsel "will not be decided on direct appeal unless clear and irrefutable proof of the issue appears on the face of the record." Petitioner's Brief at 11. Although *Cook* does so state, it has been plainly overruled by subsequent decisions of the Supreme Court of Pennsylvania. Citing *Commonwealth* v. *Davis*, 499 Pa. 282, 453 A.2d 309 (1982), the Commonwealth acknowledges that claims raised in terms of ineffectiveness that require some further record may be the subject of a remand, 499 Pa. 283-84, 453 A.2d at 310, but the Commonwealth argues

that the claims should be presented in a collateral attack on the conviction. However, as *Hubbard* made clear, the Pennsylvania appellate courts may remand for further hearings and the parties may then bring the matter back to the Supreme Court for review. There is no known statement in the decisions of the Pennsylvania appellate courts establishing a rule that a collateral attack is required or preferred in this context, or even establishing a standard by which the Pennsylvania courts will determine whether to review a previously defaulted claim on direct appeal. Thus, the Pennsylvania courts have reserved the sole and unrestricted discretion to review such claims on direct appeal, or to decline to do so, rather than requiring a collateral attack on the conviction.

The central question raised in this case is whether presentation of otherwise defaulted claims which are within Pennslyvania's ineffectiveness of counsel exception to its default rule constitutes a "fair opportunity" to review the claim, or is more akin to the extraordinary writs in *Ex parte Hawk* and *Pitchess* v. *Davis*. Based on the well established and documented procedures in the Pennsylvania courts, and the policies and principles underpinning the exhaustion rule, the claims so presented are plainly exhausted. At least four reasons support this conclusion.

First, Pennsylvania's review of claims under this rule is routine, well-established and in the ordinary course of the day-to-day administration of justice in the courts of the Commonwealth. Unlike the writs in *Ex parte Hawk* and *Pitchess* v. *Davis*, there is nothing extraordinary about such review.

Second, review on direct appeal under this rule does not require compliance with any additional burden or stan-



dard beyond that which would be applied on collateral review in the state courts. To the contrary, and unlike the situation *Ex parte Hawk* and *Pitchess* v. *Davis*, if the Supreme Court of Pennsylvania declines to review the claims on direct appeal, the prisoner would have the same burdens on collateral attack in terms of demonstrating a substantive error and the ineffectiveness of counsel in failing to preserve the claim. On both direct appeal and state collateral review, he would be required to demonstrate that any default was due to the ineffectiveness of counsel.

Third, Pennsylvania's rule is based, in part, on notions of judicial economy. To require a prisoner to mount a state collateral attack after review is denied by the Supreme Court of Pennsylvania would cause a needless waste of Pennsylvania's judicial resources. Since Pennsylvania law makes it clear the Pennsylvania courts do consider ineffectiveness claims on direct appeal, an exhaustion rule requiring a state collateral attack does violence to Pennsylvania's policy of judicial economy and renders wasted any resources already expended by the courts of the Commonwealth in their consideration of the claims on direct review.

Fourth, notions of comity are advanced by finding exhaustion in this case. Pennsylvania is otherwise a relatively waiver-oriented jurisdiction, but, after due deliberation and through a normal common law process of evaluation, has expressly announced a rule permitting review of otherwise defaulted claims. To hold such claims are not exhausted is to demean the prerogative of the Supreme Court of Pennsylvania to develop its own legal principles by rendering Pennsylvania's rule a nullity.

There is an irony to the Commonwealth's characterization of the mischief that would allegedly result if this

Court finds exhaustion for claims defaulted but plainly within Pennsylvania's ineffectiveness of counsel exception to its waiver rule. However, a holding that such claims are unexhausted would do far more to demean the Pennsylvania judiciary and to wreak havoc with its carefully balanced and well-considered system for adjudicating ineffectiveness claims. These ineffectiveness claims are held justiciable on direct appeal in order to advance judicial economy and as a consequence of Pennsylvania's rule that they are waived if not raised on direct appeal. To hold now that such claims must be presented through a collateral attack, as the Commonwealth urges, is to cause the same waste of judicial resources which caused the Pennsylvania courts to recognize the exception to the waiver rule in the first instance. More seriously, if this Court were to require collateral review, Pennsylvania's rule finding waiver when ineffectiveness claims are not raised on direct appeal will no longer be valid or enforceable since the waiver rule established that ineffectiveness claims raised by new counsel are justiciable. The damage to federal/state comity from such interference in the administration of justice in the Commonwealth of Pennsylvania would be immense.

Most importantly, the ultimate basis for the comity-based exhaustion rule—that state and federal courts are equally bound to enforce the federal constitution—is advanced by holding these claims to be exhausted, because the Supreme Court of Pennsylvania had an opportunity to review the claims pursuant to and in accordance with its own pronouncements.

The Commonwealth contends that the *pro se* Petition for Allowance of Appeal may not be considered in determining whether the claims were exhausted. The *pro se* Petition was a timely-filed petition for substantive review



and the appointment of counsel. It complied with the applicable rules of procedure as to the contents of a petition for allowance of appeal and expressly requested substantive review and the appointment of counsel.

The Commonwealth contends that the *pro se* Petition may not be considered to be a request for substantive review but should only be considered a request for the appointment of counsel because that is required under some "standard practice" in Pennsylvania. This argument is meritless, because there is no statement in the statutes, rules or decisional authority to the effect that *pro se* petitions for allowance of appeal may not be considered as a request for substantive review. Petitioner's Brief at 17. Any claim of a "standard practice" is completely unsupported and is inconsistent with the rules and statutes of Pennsylvania. The *pro se* Petition plainly requested substantive review and, by way of separate relief, asked for appointment of counsel.

The *pro se* Petition for Allowance of Appeal cited the appropriate statute and rule of court in its opening paragraph (J.A. at 49).[17] The title of the document plainly requests two forms of relief, substantive review and appointment of counsel (*Id.*) and the relief requested consists of the following:

> WHEREFORE, for all of the foregoing reasons your Honorable Supreme Court should grant the *pro se* petition of Michael Peoples for allowance to appeal the constitutional and Statutory errors of the lower

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[17] The *pro se* Petition properly cited Rule 1113 of the Pennsylvania Rules of Appellate Procedure but cited "42 Pa. C.S.A. Section 524" as the basis for discretionary review. The reference to "Section 524" is plainly a typographical error since Section 724 of the Pennsylvania Judicial Code grants discretionary jurisdiction.

court and the Superior court *and* to order appointment of new counsel who can raise and argue ineffective assistance of former trial, post-verdict and appellate counsel.

(J.A. at 58-59)(emphasis added).

The Supreme Court of Pennsylvania did not rule on the merits of the *pro se* petition, but rather appointed counsel. The fact remains, however, that the court could have undertaken a review of the claims in the *pro se* Petition and thus had the requisite opportunity to address the claims.

### III. Application Of Exhaustion Principles To Respondent's Claims

#### A. Admission Of Prior Convictions

The argument that he was improperly cross-examined on his prior convictions was raised in Mr. Peoples' post-trial motions (J.A. at 12), and was raised in his Superior Court brief (J.A. at 28, 34-37). It was raised in the counseled Petition for Allowance of Appeal (J.A. at 66-67), and it was raised as well in the *pro se* Petition for Allowance of Appeal (J.A. at 53). In the *pro se* Petition, Mr. Peoples argued that he was denied a "fair trial" and cited the decisions of the Supreme Court of Pennsylvania in *Commonwealth* v. *Schmidt*, 317 Pa.Super. 241, 463 A.2d 1175 (1983) and *Commonwealth* v. *Bighum*, 452 Pa. 554, 307 A.2d 255 (1973).

The federal habeas petition alleges a "due process 14th amendment" violation based upon the use of two prior robbery convictions and a conviction for retail theft to impeach Mr. Peoples' credibility (J.A. at 73).[18] The Com-

[18] The claim is also characterized as being based on violation of a state statute which prohibits use of prior convictions (J.A. at 73). *See* 42 Pa. C.S. § 5918.



monwealth argues that the legal basis of this claim was not presented to the state courts[19] since it was raised in terms of the ineffective assistance of counsel under the Sixth Amendment in both the *pro se* Petition for Allowance of Appeal and the counseled Petition for Allowance of Appeal (Petitioner's Brief, p. 12). In addition, the Commonwealth contends that the claim was unreviewable by the state court due to the lack of a record (Petitioner's Brief, p. 13).

The claim based on the impeachment use of Mr. Peoples' prior convictions was raised in the *pro se* Petition in terms of ineffective assistance of counsel, prosecutorial misconduct, and in terms of substantive error by the trial court and the Superior Court,[20] causing the deprivation of Mr. Peoples' right to "receive a fair trial" (J.A. at 53). It was also raised in the counseled Petition for Allowance of Appeal (J.A. at 66-67). Although Mr. Peoples also relied on the state statute regulating use of prior convictions, it is manifestly clear that the federal due process clause was the basis for review for at least four reasons. First, in his *pro se* Petition, Mr. Peoples referred to the deprivation of a "fair trial" caused by the use of the convictions. Under

[19] The Commonwealth also contends that the evidence was not objected to at trial. If this is to suggest that the claim was not preserved at trial because an objection was not made while Mr. Peoples was being cross-examined, it is meritless. The question of the impeachment use of convictions is the subject of a separate hearing in Pennsylvania, known as a *Bighum* hearing, convened before the defendant testifies. Such a hearing was held in this case (n.t. Trial 259, 269). Moreover, there is no requirement of a separate objection at the time of the testimony in order to preserve the claim.

[20] The *Pro Se* Petition alleged that the "trial court and Superior Court committed error by upholding the unlawful ruling by violating, *Commonwealth* v. *Bighum*, 452 Pa. 554" (J.A. at 53).

the "substantial equivalency" approach adopted in *Picard*, the Supreme Court of Pennsylvania was plainly aware that the petitioner asserted that the overall impact of the admission of such evidence was to taint the truth-finding function of the trial, a claim sounding in due process.

Second, Mr. Peoples cited the decision of the Supreme Court of Pennsylvania in *Commonwealth* v. *Bighum*, 452 Pa. 554, 307 A.2d 255 (1973), a case in which the Court established guidelines for the use of prior convictions to impeach a testifying criminal defendant (J.A. at 53). The procedure for determining whether a testifying defendant may be impeached is known in Pennsylvania as a *Bighum* hearing, and such a hearing was held in this case (n.t. Trial at 269). A citation or reference to *Bighum* alone alerted the Supreme Court of Pennsylvania to a claim of a due process violation. In *Bighum*, a criminal defendant alleged a due process violation based upon the trial court's determination that prior convictions were admissible. 452 Pa. at 562, 307 A.2d at 260. The Supreme Court of Pennsylvania rejected the claim, relying upon the due process analysis of this Court in *Spencer* v. *Texas*, 385 U.S. 554, *reh'g denied*, 386 U.S. 969 (1967)(due process challenge to Texas redicivist statute permitting admission of prior convictions during guilt phase). A citation or reference to *Bighum* is thus tantamount to and is understood to be an express invocation of the due process clause.

Third, the history of litigation before the Supreme Court of Pennsylvania concerning the issue of the admissibility of prior convictions of testifying criminal defendants alone would alert the Supreme Court to the basis for the claim. Although decisions have also discussed the state statute regulating such use, consideration of the due process implications and the impact on the



overall fairness of the trial is a consistent theme. *See Commonwealth* v. *Moore*, 246 Pa. Super. 163, 369 A.2d 862 (1977) (*Bighum* cited and construed to be based on due process analysis); *Commonwealth* v. *Butler*, 405 Pa. 36, 173 A.2d 468 (1961) (due process); *Commonwealth* v. *Miller*, 465 Pa. 458, 350 A.2d 855 (1976) (citation to *Bighum); Commonwealth* v. *Peterman*, 430 Pa. 627, 244 A.2d 723 (1968) (due process clause not expressly cited, but impact on overall fairness of the trial considered).

Fourth, in the counseled Petition for Allowance of Appeal, counsel cited not only the state statute on impeachment and cited *Commonwealth* v. *Schmidt*, 317 Pa. Super. 241, 463 A.2d 1175 (1983) (construing the statute on impeachment use of convictions), but also cited *Commonwealth* v. *Moore*, discussed *supra*, a case specifically addressing due process considerations and citing *Bighum* (J.A. at 64-68).

The Commonwealth's contention that the claim is phrased in the state courts only in terms of ineffective assistance of counsel and prosecutorial misconduct is similarly unavailing. The reference to "prosecutorial misconduct" in the *pro se* Petition is not an unexpected characterization of the issue by a lay petitioner since it was the prosecutor who impeached Mr. Peoples and argued the convictions to the jury. However, Mr. Peoples did not limit his characterizations to those phrases. He further argued as follows in his *pro se* Petition:

> The *trial court and Superior Court committed error by* upholding the unlawful ruling by violating, *Commonwealth* v. *Bighum* . . . and[21] allowing the Com-

[21] The quoted sentence also included a reference to a deprivation of Mr. Peoples' "Sixth Amendment right" to present his "only meaningful defense." (J.A. at 53).

> monwealth to use evidence of unrelated prior robbery and theft criminal convictions before the jury to discredit defendant's trial testimony.

(J.A. at 53)(emphasis added)

Finally, the Commonwealth argues that the lack of a record precluded the Supreme Court from actually considering the issue (Petitioner's Brief, p. 13). Although the Commonwealth concedes that Mr. Peoples was obligated to raise the claim at that stage, it argues that a petition under the Pennsylvania Post Conviction Relief Act was required.[22] This argument is meritless since a record was made as to the claim based on the improper admission of the prior convictions. The claim was made in the Post Verdict Motions (J.A. at 12) and was addressed in the trial court's post-trial opinion (discussion of "*Bighum* hearing" convened before the defense opened its case) (J.A. at 21-22). It was addressed on appeal in the Superior Court's brief (relying on *Bighum)* (J.A. 28, 34-37), in the Superior Court's Memorandum Opinion (J.A. at 46), in the *pro se* Petition for Allowance of Appeal (J.A. at 53), and in the counseled Petition for Allowance of Appeal (J.A. at 66-67).[23] Moreover, there is no requirement that a record be made before the Supreme Court of Pennsylvania may consider such a claim.

Accordingly, the claim of a due process violation based on the impeachment use of Mr. Peoples' prior convictions

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[22] 42 Pa. C.S. § 9541 *et seq.*

[23] In the counseled Petition for Allowance of Appeal, counsel may be read to posture this argument in terms of ineffective assistance of counsel and to request a remand to make a record (J.A. at 66-68). This assertion by counsel was erroneous and is apparently the basis for the district attorney's representation that no record exists to support the claim.



was fairly presented to the Supreme Court of Pennsylvania and is thus exhausted.

**B. Deprivation Of A Non-Jury Trial**

The claim that he was unconstitutionally deprived of a non-jury trial was not raised in the Superior Court Brief (J.A. at 26-43). Although the issue was not raised in the counseled Petition for Allowance of Appeal (J.A. at 64-68), the claim of a due process and equal protection violation on the basis of the denial was amply and precisely raised in the *pro se* Petition for Allowance of Appeal (J.A. at 53-54).

In his federal habeas petition Mr. Peoples contended that he was denied a non-jury trial, in violation of the due process clause and the equal protection clause of the Fourteenth Amendment (J.A. at 74). In his *pro se* Petition for Allowance of Appeal, this claim was raised in terms of his "Federal and State constitutional rights to equal protection and Due Process of the laws under the Fourteenth Amendment of the United States constitution." (J.A. at 53).

The Commonwealth contends that the claim of an equal protection and due process violation was waived and was not reviewable by the Supreme Court since the claim was not made in Mr. Peoples' Post Verdict Motions or in the Superior Court Brief. Even if Mr. Peoples' Superior Court or trial counsel did not raise due process and equal protection arguments with sufficient specificity in the trial court and the Superior Court, the claims were expressly made in the *pro se* Petition for Allowance of Appeal in terms of the due process and equal protection clauses (J.A. at 53). It was specifically argued that the failure of previous counsel to properly raise these claims constituted the ineffective assistance of trial and appellate counsel (J.A.

at 50, 52, 53). Raised in this way, the claims were not defaulted and were reviewable by the Supreme Court of Pennsylvania on direct appeal.

### C. Tainted Identification Procedures

The claim that improper identification procedures were used was raised in Post Trial Motions (J.A. at 12), was discussed in the Opinion denying his Post Trial Motions (J.A. at 20-21), was asserted in the Superior Court Brief (J.A. at 27, 29-34), and was discussed in the Superior Court's Memorandum Opinion (J.A. at 45). The issue was not raised in the counseled Petition for Allowance of Appeal (J.A. at 64-68), but was raised in explicit terms in the *pro se* Petition for Allowance of Appeal (J.A. at 54-55). Thus, the issue was properly placed before the Supreme Court of Pennsylvania.

### D. Ineffective Assistance Of Counsel

Mr. Peoples raises two claims in his habeas corpus Petition as to the ineffectiveness of counsel (J.A. at 74-75):

a. Trial Counsel failed to seek suppression of the fruits of the arrest (J.A. at 74).

This claim was not raised in Post Trial Motions (J.A. 11-13) and was not raised in the Superior Court Brief by new counsel (J.A. at 41-43). It was raised in terms of the ineffective assistance of appellate counsel in the counselled Petition for Allowance of Appeal (J.A. at 67). The failure of Superior Court Counsel to raise the claim was alleged to constitute the ineffective assistance of counsel (J.A. at 67). Thus, the claim was reviewable on direct appeal by the Supreme Court of Pennsylvania.



b. Trial Counsel failed to object to evidence of a change in Mr. Peoples' hair, allegedly in violation of a court order (J.A. at 74-75).

This was not addressed in the Post Trial Motions, the Superior Court Brief or the counseled Petition for Allowance of Appeal. However, it was raised expressly and explicitly, in terms of the ineffective assistance of trial and appellate counsel, in the *pro se* Petition for Allowance of Appeal (J.A. at 55-57). The failure of trial and Superior Court counsel to properly preserve the claim was specifically alleged to constitute the ineffectiveness of counsel. (J.A. at 50, 55) Thus, the claim was reviewable on direct appeal by the Supreme Court of Pennsylvania.

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the order of the Third Circuit Court of Appeals be affirmed.

Respectfully submitted,

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